1963

CANADA
LAW REPORTS

RAPPORTS JUDICIAIRES
DU CANADA

Supreme Court of Canada
Cour Suprême du Canada

Editors—Arrêtistes

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Ottawa, 1964

JUDGES

OF THE

SUPREME COURT OF CANADA

The Honourable PATRICK KERWIN, P.C., *Chief Justice of Canada.*

The Honourable ROBERT TASCHEREAU, P.C., *Chief Justice of Canada.*

The Honourable JOHN ROBERT CARTWRIGHT.

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

The Honourable EMMETT MATTHEW HALL.

The Honourable WISHART FLETT SPENCE.

ATTORNEYS GENERAL OF CANADA

The Honourable DONALD M. FLEMING, Q.C.

The Honourable LIONEL CHEVRIER, Q.C.

SOLICITORS GENERAL OF CANADA

The Honourable WILLIAM J. BROWNE, Q.C.

The Honourable J. WATSON MACNAUGHT, Q.C.

MEMORANDA

On the 2nd day of February, 1963, the Honourable Patrick Kerwin, P.C., Chief Justice of Canada, died.

On the 22nd day of April, 1963, the Honourable Robert Taschereau, Puisne Judge of the Supreme Court of Canada, was appointed Chief Justice of Canada.

On the 11th day of June, 1963, the Honourable Wishart Flett Spence, a judge of the Supreme Court of Ontario and a member of the High Court of Justice for Ontario, was appointed as Puisne Judge of the Supreme Court of Canada.

JUGES

DE LA

COUR SUPRÊME DU CANADA

L'honorable PATRICK KERWIN, C.P., *juge en chef du Canada.*

L'honorable ROBERT TASCHEREAU, C.P., *juge en chef du Canada.*

L'honorable JOHN ROBERT CARTWRIGHT.

L'honorable GÉRALD FAUTEUX.

L'honorable DOUGLAS CHARLES ABBOTT, C.P.

L'honorable RONALD MARTLAND.

L'honorable WILFRED JUDSON.

L'honorable ROLAND A. RITCHIE.

L'honorable EMMETT MATTHEW HALL.

L'honorable WISHART FLETT SPENCE.

PROCUREURS GÉNÉRAUX DU CANADA

L'honorable DONALD M. FLEMING, C.R.

L'honorable LIONEL CHEVRIER, C.R.

SOLLICITEURS GÉNÉRAUX DU CANADA

L'honorable WILLIAM J. BROWNE, C.R.

L'honorable J. WATSON MACNAUGHT, C.R.

MEMORANDA

Le 2 février, 1963, l'honorable Patrick Kerwin, C.P., juge en chef du Canada, est décédé.

Le 22 avril, 1963, l'honorable Robert Taschereau, juge puîné de la Cour suprême du Canada, a été nommé juge en chef du Canada.

Le 11 juin, 1963, l'honorable Wishart Flett Spence, juge de la *Supreme Court of Ontario* et membre de la *High Court of Justice for Ontario*, a été nommé juge puîné de la Cour Suprême du Canada.

64210—1½

UNREPORTED JUDGMENTS—JUGEMENTS NON RAPPORTÉS

The following judgments rendered during the year will not be reported

Les jugements suivants rendus durant l'année ne seront pas rapportés

Aluminium Union Ltd. v. Minister of National Revenue, [1960] Ex. C.R. 363, appeal dismissed with costs, June 13, 1963.

Argyll, The v. The Sunima, [1962] Ex. C.R. 293, appeal dismissed with costs, June 24, 1963.

Banque Canadienne Nationale v. Consolidated Paper Corporation, [1962] Que. Q.B. 805, appeal dismissed with costs, June 5, 1963.

Benjamin Bros. Ltd. v. Chennells Construction Co. (Man.), appeal dismissed with costs, May 28, 1963.

Bertrand v. Anderson and Rennie, [1963] Que. Q.B. 523, appeal dismissed with costs, March 12, 1963.

Bobrowski v. Canadian Fire Insurance Co., 39 W.W.R. 351, 35 D.L.R. (2d) 127, appeal dismissed with costs, October 7, 1963.

Boland v. Matachewan Canadian Gold Ltd. (Ont.), appeal dismissed with costs, November 27, 1963.

Boland v. U.S. Fidelity & Guaranty Co. (Ont.), appeal dismissed with costs, November 27, 1963.

Boulanger v. Di Paolo Gen. Bldg. Contractors, [1962] Que. Q.B. 783, appeal dismissed with costs, March 7, 1963.

Boutin v. Neuman, 42 W.W.R. 677, appeal allowed with costs, December 2, 1963.

Calgary, City of and Steele v. McGinn, 39 W.W.R. 370, appeal dismissed with costs in any event of the cause but there will be no costs of the motion for leave to appeal, January 30, 1963.

Canadian Steamship Lines Ltd. v. The Queen (Exch.), appeal dismissed with costs, June 6, 1963.

Crown Zellerbach Canada Ltd. v. Provincial Assessors of Comox, Cowichan and Nanaimo, 42 W.W.R. 480, appeal dismissed with costs, October 21, 1963.

Desjardins v. The Queen, [1963] Que. Q.B. 381, appeal dismissed, June 11, 1963.

Foundation Co. of Ont. Ltd. v. Lackie Bros. Ltd. and Toronto Cast Stone Co. (Ont.), appeal dismissed with costs, May 1, 1963.

Frascarelli v. Maryland Casualty Co., [1961] Que. Q.B. 545, appeal dismissed with costs, June 24, 1963.

Halley v. Minister of National Revenue, [1963] Ex. C.R. 372, appeal dismissed with costs, December 6, 1963.

Interprovincial Steel & Pipe Corpn. et al. v. Railway Association of Canada, C.P.R. and C.N.R. (B. of T.C.), appeal dismissed with costs, December 10, 1963.

Keystone Contractors Ltd. v. Felsher (Ont.), appeal dismissed with costs, December 5, 1962.

Kramer and Grekin v. The Queen, [1961] Que. Q.B. 534, appeals dismissed, November 4, 1963.

Laferrière v. Atlas Parking Ltd., [1962] Que. Q.B. 422, appeal dismissed with costs, January 22, 1963.

Lemay v. Kingsbury, [1962] Que. Q.B. 546, appeal dismissed with costs, March 13, 1963.

Lemcovitz v. W. H. Currie Express & Storage Co., [1962] Que. Q.B. 75, appeal dismissed with costs, March 18, 1963.

Lucas v. The Queen, 38 C.R. 403, appeal dismissed, Cartwright J. dissenting, November 30, 1962.

Majcunich v. Badger and Streight, 29 D.L.R. 536, appeal dismissed with costs, May 1, 1963.

Mariani and Galardo v. Town of Mount Royal, [1963] Que. Q.B. 308, appeal dismissed with costs, March 15, 1963.

McBride v. California Standard Co., 38 D.L.R. 666, subject to a variation in the judgment appealed from, the appeal is dismissed with costs, May 15, 1963.

Model Jewellery Mfg. Co. v. Western Assurance Co., [1962] O.R. 1099, 35 D.L.R. (2d) 381, appeal dismissed with costs, November 26, 1963.

Mulcahy v. The Queen (N.S.), appeal allowed and record returned to Court of appeal to impose sentence on substantive offence, May 28, 1963.

Nodge v. The Queen (Ont.), appeal allowed and conviction quashed, November 21, 1963.

Port Weller Dry Docks Ltd. v. American Export Lines Ltd., [1962] Ex. C.R. 188, appeal dismissed with costs, May 2, 1963.

Prince Albert School Unit 56 Board v. National Union Public Employees, Local Union No. 832, 39 W.W.R. 314, 35 D.L.R. (2d) 361, appeal dismissed with costs, but there will be no costs for or against the Labour Relations Board, January 31, 1963.

Queen, The v. Brown, 41 W.W.R. 129, appeal allowed and conviction restored, May 2, 1963.

Roman v. Toronto General Trusts Corporation, [1962] O.R. 1077, 35 D.L.R. (2d) 304, appeal dismissed with costs, November 6, 1963.

Roy v. The Queen (Exch.), appeal dismissed with costs, November 6, 1963.

Shewchuck v. McDonald, 39 W.W.R. 384, appeal dismissed with costs, May 8, 1963.

Smith v. Minister of National Revenue, [1961] Ex. C.R. 136, appeal dismissed with costs, March 26, 1963.

Vee Bar Vee Ranch Ltd. v. Rooke (Alta.), appeal dismissed with costs, May 14, 1963.

West York Coach Lines Ltd. v. Minister of National Revenue, [1962] Ex. C.R. 323, appeal dismissed with costs, March 25, 1963.

MOTIONS—REQUÊTES

Applications for leave to appeal granted are not included in this list.

Cette liste ne comprend pas les requêtes pour permission d'appeler qui ont été accordées.

Alexander v. The Queen (Ont.), leave to appeal refused, December 3, 1962.

Arbuckle v. The Queen (Ont.), leave to appeal refused, March 25, 1963.

Argyll v. Sunima, [1962] Ex. C.R. 293, motion to appoint assessors dismissed with costs, February 26, 1963.

Arnold Farms Ltd. v. Archambeault, [1963] 1 O.R. 161, leave to appeal refused with costs, March 11, 1963.

Barthe v. The Queen, [1963] B.R. 363, leave to appeal refused, April 23, 1963.

Beacon Plastics v. Labour Relations Board of Quebec, (Que.), leave to appeal refused with costs, December 9, 1963.

Beaudry v. Molson, [1963] B.R. 584, leave to appeal refused with costs, October 15, 1963.

Bériault v. The Queen, [1962] B.R. 968, leave to appeal refused, December 10, 1962.

Bérubé v. The Queen, [1963] B.R. 480, leave to appeal refused, May 27, 1963.

Blind River v. Dyke, (Ont.), leave to appeal refused with costs, January 29, 1963.

Bruneau v. The Queen (Ont.), leave to appeal refused, November 4, 1963.

Calgary Power Ltd. v. Danchuk et al., 41 W.W.R. 124, leave to appeal refused with costs, March 25, 1963.

Cargill Grain Co. Ltd. v. Foundation Co. of Canada, [1963] B.R. 94, leave to appeal refused with costs, February 19, 1963.

Dharny v. The Queen, (Ont.), leave to appeal refused, December 17, 1962.

Elias v. Penner (Man.), leave to appeal refused with costs, October 28, 1963.

Essa v. Maple Leaf Services, [1963] 1 O.R. 475, leave to appeal refused with costs, May 1, 1963.

Fong Sing v. The Queen, 35 W.W.R. 525, leave to appeal refused, December 17, 1962.

Foster v. The Queen (Ont.), leave to appeal refused, May 27, 1963.

Greenwood v. The Queen (Alta.), leave to appeal refused, February 25, 1963.

Horban v. The Queen (Man.), leave to appeal refused, November 1, 1963.

Hori v. Lasalle et al. (Que.), leave to appeal refused with costs, October 29, 1963.

Kelly v. The Queen (Ont.), leave to appeal refused, April 23, 1963.

Kissick v. The Queen, (Sask.), leave to appeal refused, November 1, 1963.

Lafleur v. Minister of National Revenue [1963] B.R. 595, leave to appeal refused with costs, June 14, 1963.

Lafontaine v. Richard (Que.), leave to appeal refused with costs, December 16, 1963.

La Lavandière Ouest Inc. v. The Queen, [1963] B.R. 368, leave to appeal refused with costs, May 1, 1963.

Leitman et al. v. The Queen, (Ont.), leave to appeal refused, December 10, 1962.

Letendre v. The Queen, 41 W.W.R. 669, leave to appeal refused, April 30, 1963.

Létourneau v. Bégin [1963] B.R. 96, leave to appeal refused with costs, February 26, 1963.

Mayers Ltd. v. Winnipeg, 40 W.W.R. 368, leave to appeal refused with costs, March 11, 1963.

Montréal v. Régie de l'électricité et du gaz, [1963] B.R. 863, leave to appeal refused with costs, June 24, 1963.

Musicale Network et al. v. The Queen (B.C.), leave to appeal refused, March 27, 1963.

L'Office des Marchés Agricoles du Québec v. Carnation Co. Ltd., [1963] B.R. 563, leave to appeal refused with costs, February 19, 1963.

Ottawa v. Queensview Construction (Ont.), leave to appeal refused with costs, June 10, 1963.

Ottawa v. Royal Trust Co., [1963] 2 O.R. 573, motion to quash dismissed with costs, November 12, 1963.

Ouimet v. Ouimet, [1963] B.R. 735, leave to appeal refused with costs, February 26, 1963.

Patmore v. Council of Association of Professional Engineers of B.C., 42 W.W.R. 598, leave to appeal refused with costs, October 2, 1963.

Paton v. The Queen (B.C.), motion for habeas corpus dismissed, November 12, 1963.

Patricks v. The Queen (Ont.), leave to appeal refused, November 12, 1963.

Peconi v. The Queen (Ont.), leave to appeal refused, May 1, 1963.

Petawawa v. Maple Leaf Services, [1963] 1 O.R. 475, leave to appeal refused with costs, May 1, 1963.

Poirier v. Giroux, [1962] B.R. 781, leave to appeal refused with costs, January 22, 1963.

Queen, The v. Simard (Que.), leave to appeal refused, June 10, 1963.

Rushton v. The Queen, 48 M.P.R. 271, leave to appeal refused, October 15, 1963.

Samson v. Samson et al. (Que.), leave to appeal refused with costs, November 26, 1963.

Sanitary Refuse Collectors Inc. v. Comité paritaire de l'industrie du camionnage de l'île de Montréal, et al., Laforge et Cour des sessions de la paix. [1963] B.R. 360, leave to appeal refused with costs, December 19, 1963.

Serplus v. The Queen (Ont.), leave to appeal refused, June 17, 1963.

Sommervill v. The Queen, 43 W.W.R. 87, leave to appeal refused, June 24, 1963.

Southern Garage (1959) Ltd. v. The Queen, 42 W.W.R. 546, leave to appeal refused with costs, December 9, 1963.

Trella v. The Queen (Ont.), leave to appeal refused, October 28, 1963.

TABLE OF JUDGMENTS AND MOTIONS

TABLE DES JUGEMENTS ET MOTIONS

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SUPREME COURT OF CANADA

NOTICE TO THE PROFESSION

Re: *Printing of Case*

In too many instances the case is printed in a manner which does not comply with Rule 12. This would appear to indicate lack of supervision by the solicitor. Attention is specially directed to that rule at paragraphs

(6) regarding printing of exhibits;

(9) as to the style of cause; and

(13) as to content of the respective parts of the case.

Please note that Part IV should contain only judgments, followed by reasons for judgment, with the addition of the Registrar's certificate (form P), and solicitor's certificate (form O). Notices of appeal, orders granting leave to appeal and approving security, where applicable, should appear in Part I. Part IV should also indicate by names all the Judges who sat, and also the concurrences of the various Judges, with the respective reasons for judgment.

A consistent format in printing the case assists the Court. Where there is non-compliance with the rules, appropriate application should be made to a Judge, pursuant to Rule 13, if the error cannot be corrected.

THE REGISTRAR

September 18, 1963.

COUR SUPRÊME DU CANADA

AVIS AUX MEMBRES DU BARREAU

Re: *Impression du dossier*

Trop souvent le dossier conjoint n'est pas imprimé d'une manière conforme aux exigences de la règle 12. Ceci semble indiquer un manque de surveillance de la part des procureurs. Votre attention est tout spécialement attirée aux paragraphes suivants de cette règle

(6) concernant l'impression de pièces;

(9) concernant l'intitulé de la cause; et

(13) concernant le contenu des différentes parties du dossier.

Vous êtes priés de prendre note que la partie IV ne doit contenir que les jugements, suivis des notes des juges, avec en plus le certificat du greffier (formule P.) et le certificat du procureur (formule O.). Les avis d'appel et, lorsque le cas l'exige, les ordonnances accordant la permission d'appeler et approuvant le cautionnement, doivent être placés dans la partie I. La partie IV doit mentionner les noms de tous les juges qui ont siégé avec leurs notes respectives et mentionner aussi le cas lorsqu'un juge partage l'opinion d'un autre.

L'uniformité dans la manière d'imprimer le dossier conjoint est d'une grande assistance pour la cour. Lorsqu'on ne se conforme pas aux règles et que l'erreur ne peut pas être corrigée, l'autorisation d'un juge doit être obtenue en vertu de la règle 13.

LE REGISTRAIRE

le 18 septembre 1963

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

64200-9—1

HER MAJESTY THE QUEEN .....APPELLANT;

AND

WILLIAM THOMAS ALEXANDER DOIG ..... RESPONDENT.

1962

*May 25
**Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Conviction for counterfeiting—Monies in possession of accused at time of arrest filed as exhibits—Disappearance of monies from registry—Application for return of exhibits or equivalent sum—Alternative claim a claim to recover monies from Crown—Proceedings to be initiated by petition of right—Crown's liability to be first determined by Supreme Court of the province.

The respondent was convicted on charges of counterfeiting. At the time of his arrest he had in his possession two envelopes, each of which was said to contain a specified amount of American currency, and the envelopes said to contain these monies were filed as exhibits at the trial. After his conviction they remained in the custody of the registrar of the Court, but later they disappeared from the registry. An application for an order that the money exhibits be returned to the respondent or alternatively that a sum of money equivalent in value to the said money exhibits be paid to the respondent in lieu of the return of the money exhibits was dismissed. On appeal, the Court of Appeal held that the appeal should be allowed and an order made that the money exhibits be returned to the respondent. By leave of this Court the Crown appealed from that judgment.

Held: The appeal should be allowed.

The alternative claim advanced was a claim to recover monies from the Crown. The Court of Appeal dealt with the matter on the footing that the monies were then in the custody of the registrar, whereas there were no such monies. Since this was made known to the Court in a report made by the County Court judge and was common ground between the parties, the proper construction to be placed upon the judgment was that it constituted an award against the Crown in favour of the respondent in the amount stated. The respondent's remedy, if any, was by proceedings initiated by petition of right under the provisions of the *Crown Procedure Act*. The question of the Crown's liability must first have been determined by the Supreme Court of the province before the Court of Appeal acquired jurisdiction to deal with the matter. The order dismissing the application should therefore be restored upon the ground that the County Court was without jurisdiction to deal with the money claim made against the Crown.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], setting aside an order of Remnant C.C.J. Appeal allowed.

*PRESENT: Locke, Fauteux, Abbott, Martland and Ritchie JJ.

**The reasons for judgment of Locke J., who retired from the bench on September 16, 1962, were handed down by Fauteux J., pursuant to s. 27(2) of the *Supreme Court Act*.

[1] (1961), 130 C.C.C. 95.

1962

THE QUEEN v. DOIG

W. G. Burke-Robertson, Q.C., for the appellant.

H. Rankin, for the respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal brought by leave granted by this Court from a judgment of the Court of Appeal for British Columbia[1] setting aside an order made by His Honour Judge Remnant in the County Court of Vancouver and directing that a sum of $3,275 in American funds, or the equivalent thereof in Canadian funds, be paid to the respondent.

The respondent Doig was on April 25, 1957, found guilty in the County Court Judge's Criminal Court of Vancouver of four charges of counterfeiting and conspiracy to counterfeit and sentenced to four years' imprisonment. At the time of his arrest he had in his possession two envelopes, one of which was said to contain $2,200 in American currency and the second $1,075 of such currency, and the envelopes said to contain these monies were filed as exhibits at his trial. After his conviction they remained in the custody of the registrar of the Court.

Following the release of Doig from the penitentiary, his solicitor served a notice on counsel for the Crown which was entitled "In the County Court Judge's Criminal Court In the Matter of Regina vs. William Thomas Alexander Doig" and which stated that an application would be made before the judge in chambers on September 19, 1960, for an order

> that the money exhibits in the criminal case of Regina vs. Doig, number 31/57 be returned to the Defendant.

This application was supported by an affidavit of Mr. Lawrence E. Hill, the solicitor for Doig, which stated, *inter alia*, that he had been advised by the registrar that:

> the original money exhibit is no longer within the custody of the said Registrar, the said original exhibit having disappeared from the said Registry and that whatever disposition is made of the monies hereinbefore referred to it will be necessary that the Province of British Columbia replace the said monies with an equivalent amount.

Thereafter, a notice dated October 3, 1960, was served by the solicitor for Doig informing the Crown that:

> the application will be for an Order directing that the money exhibits in the criminal case of Regina vs. Doig be returned to the Defendant or alternatively that a sum of money equivalent in value to the said money exhibits be paid to the Defendant in lieu of the return of the said money exhibits.

[1] (1961), 130 C.C.C. 95.

While the amended notice did not say in terms that what was proposed was an order against the Crown to pay the missing monies, it is common ground that this was the relief sought.

The learned County Court judge dismissed the application and while no written reasons were given at the time, when the appeal was taken by Doig from the order the learned judge made a report to the Court of Appeal, stated to be made pursuant to s. 588(1) of the *Criminal Code,* in which it was said that all the monies were proved to be the proceeds of the criminal activities of Doig and that they should remain in custody of the Court. The report concluded by stating that the fact that the money had disappeared from the registry was beside the point.

The formal order dismissing the application was entitled "In the County Court Judge's Criminal Court" and the style of cause was "Regina vs. William Thomas Alexander Doig."

The judgment delivered by the learned Chief Justice of British Columbia did not mention the fact that the monies were missing. After saying that it had been agreed by counsel on the hearing of the appeal that it had not been established that the money had been obtained by the commission of the offence for which the appellant had been convicted, he said:

> It is clear as a result of the foregoing that the question here and the order appealed from affect a right to property in the custody of the County Court in respect of which there is no applicable provisions of the Criminal Code. The order sought by the appellant is not one to be made or refused under the criminal jurisdiction of the County Court. This Court, in my opinion, has jurisdiction to entertain the appeal and the motion of the Crown to quash should be denied.

After referring to authorities indicating that monies taken from an accused person, unless they are shown to have been obtained by the commission of an offence, should be returned to him, the learned Chief Justice said:

> This Court has jurisdiction to make the order that should have been made in the Court below, the appeal should be allowed and an order made that the money be paid out to the appellant.

The style of cause in the formal judgment entered in the Court of Appeal was "Regina, Respondent, William Thomas Alexander Doig, Appellant." After stating that the appeal was allowed, the judgment reads:

> and the said money exhibits amounting to Three Thousand Two Hundred and Seventy-five dollars in American funds or the equivalent thereof in Canadian funds are hereby ordered returned to the appellant.

1962

THE QUEEN v. DOIG

Locke J.

It will be seen from the foregoing that the matter has been treated in both Courts as if the monies in question were in the hands of the proper official of the Court, the registrar, presumably as a servant of the Crown. While, as I have pointed out, it was known to the parties before the matter came before the learned County Court judge that the monies were missing, the solicitor for the present respondent, while appreciating that he could not obtain the form of relief sought in the original notice of motion, failed to appreciate that the alternative claim advanced was a claim to recover monies from the Crown.

If there was any basis for such a claim, presumably it would be for damages for conversion or for negligence of some servant of the Crown. In whatever form the claim might have been advanced, the matter would be governed by the provisions of the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, and the Court having jurisdiction, the Supreme Court of British Columbia, if a fiat were obtained from the Lieutenant-Governor in Council, and the proceedings would be by petition of right.

This aspect of the matter does not appear to have been drawn to the attention of the learned County Court judge who treated the application as if it were made in the criminal proceedings against the respondent which had been terminated years before. The appeal to the Court of Appeal which was brought by leave was not one under Part 18 of the *Criminal Code* and s. 588(1), requiring a report by the judge in appeals and applications for leave to appeal taken under that part, was inapplicable.

In the judgment of the Court of Appeal it was pointed out that the order sought was not one to be made or refused in the exercise of the criminal jurisdiction of the County Court. However, that judgment, with great respect, dealt with the matter on the footing that the monies were then in the custody of the registrar, whereas there were no such monies.

Since this was made known to the Court in the report made by the County Court judge and was common ground between the parties, the proper construction to be placed upon the judgment is, in my opinion, that it constitutes an award against the Crown in favour of the respondent in the amount stated.

1962

THE QUEEN v. DOIG

Locke J.

Claims of this nature against the Crown may not be established in proceedings initiated by notice of motion in the County Court. As I have pointed out, the respondent's remedy, if any, was by proceedings initiated by petition of right under the provisions of the *Crown Procedure Act*. The question of the Crown's liability must first have been determined by the Supreme Court of the province before the Court of Appeal acquired jurisdiction to deal with the matter.

The appeal should be allowed with costs and the order dismissing the application be restored upon the ground that the County Court was without jurisdiction to deal with the money claim made against the Crown. The dismissal should be without prejudice to any claims the respondent may be advised to make in the matter in proceedings properly constituted.

Appeal allowed and the order dismissing the application restored.

Solicitor for the appellant: George L. Murray, Vancouver.

Solicitor for the respondent: Lawrence E. Hill, Vancouver.

1962

*Oct. 9
Nov. 14

LABOUR RELATIONS BOARD OF THE PROVINCE OF BRITISH COLUMBIA AND BRITISH COLUMBIA INTERIOR FRUIT AND VEGETABLE WORKERS UNION, LOCAL 1572 .....APPELLANTS;

AND

OLIVER CO-OPERATIVE GROWERS EXCHANGE ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trade unions—Locals of union reorganized to form one local of new union—Variation of certificate of bargaining authority—Jurisdiction of Labour Relations Board—Labour Relations Act, 1954 (B.C.), c. 17, now R.S.B.C. 1960, c. 205, ss. 10, 12, 63, 65(2).

A number of union locals representing fruit and vegetable packing employees and certified under the *Industrial Conciliation and Arbitration Act*, R.S.B.C. 1948, c. 155, entered into collective agreements with an

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

1962

LABOUR RELATIONS BOARD *et al.* *v.* OLIVER CO-OPERATIVE GROWERS EXCHANGE

organization representing the employers. Later, the union unanimously resolved to merge with and become part of the appellant union, and the individual locals subsequently passed similar resolutions approving such merger and change of name. The appellant union applied to the Labour Relations Board for a change of the name on the certificate of bargaining authority from locals of the old union to that of the new union. Obviously, what was being done was both merger and a change of name. The judge of first instance held that the Board had power to do this under the *Labour Relations Act*, 1954 (B.C.), c. 17, now R.S.B.C. 1960, c. 205, but this decision was reversed by a majority of the Court of Appeal. The Board and the new union then appealed to this Court.

Held: The appeal should be allowed.

Per Kerwin C.J. and Martland and Judson JJ.: The Board had jurisdiction to vary the certificate as it did under s. 65(2) of the Act. It was unnecessary to proceed under ss. 10 and 12 dealing with certification and decertification; the certification procedures of ss. 10 and 12 were appropriate when a union seeks initial certification or contending unions seek certification but not in the case of a successor union resulting from a merger or reorganization. Section 65(2) conferred upon the Board an entirely independent power to vary or revoke a former order in appropriate circumstances and this included power to deal with cases not specifically provided for by the Act and which were outside the ordinary operation of s. 10 and s. 12. *In re Hotel and Restaurant Employees' International Union, Local 28 et al.* (1954), 11 W.W.R. (N.S.) 11; *R. v. Ontario Labour Relations Board, Ex parte Genaire Ltd.*, [1958] O.R. 637, affd. *sub nom. International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* (1959), 18 D.L.R. (2d) 588, referred to.

The proper record of the case consisted only of the petition of the appellant union and the decision of the Board; on the face of the record there was no error in either fact or law.

The suggestion that reg. 9(*a*), made under authority of s. 63, was an attempt by the Board to extend its jurisdiction beyond the Act was rejected.

Per Cartwright and Ritchie JJ.: The Act made specific provision by s. 12(10)(*a*) for cancellation of certification at any time when the Board was satisfied that the certified union "has ceased to be a trade union". The respondent failed to show that the provisions of this section had not been complied with, and as the Board had ample ground for being satisfied that the old unions had ceased to exist, it was to be taken that it was so satisfied and that the requirements of the section were, therefore, fulfilled.

Under the circumstances of the case, the Board was acting within the scope of the authority conferred by s. 65(2) when it granted the order in question, and so varied the original order of certification as to recognize the new local as the bargaining representative of the unit. The provisions of s. 65(2) did not clothe the Board with authority to ignore specific provisions of the Act and to so vary its orders as to achieve by a "short cut" a result which under the Act could only be achieved by taking certain specified steps. However, when it was apparent that the Board's existing order no longer reflected the true situation and when the Board was satisfied that the order should be varied in order to give effect to the true purposes of the certification

and was satisfied also that there were no provisions of the Act which specifically covered the situation, then the Board was justified in exercising the authority conferred on it by s. 65(2).

APPEAL from a judgment of the Court of Appeal for British Columbia[1], which, on an appeal from a judgment of Brown J. dismissing a motion for *certiorari,* quashed a decision of the Labour Relations Board. Appeal allowed.

A. B. Macdonald, for the appellant Union.

A. W. Mercer, for the appellant Board.

J. G. Alley, for the respondent.

The judgment of Kerwin C.J. and of Martland and Judson JJ. was delivered by

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia[1], which, on an appeal from Brown J., quashed a decision of the Labour Relations Board. The appeal is by the Labour Relations Board of the province and a union, which I shall refer to as Local 1572.

Before Local 1572 came into being the employees in the industry were represented by nine locals of the Fruit and Vegetable Workers' Union. These locals, which had been certified in 1952 under the *Industrial Conciliation and Arbitration Act,* R.S.B.C. 1948, c. 155, included employees of 23 named employers operating 30 plants in the fruit and vegetable packing industry in the Okanagan Valley. The locals and the Okanagan Federated Shippers Association representing the employers had entered into collective agreements.

Later, there was a jurisdictional dispute between the Fruit and Vegetable Workers' Union and the Teamsters' Union. This dispute came to an end in 1958, at the prompting of the Canadian Labour Congress which was to establish a new local to succeed to the rights and liabilities of the nine locals of the old union. On November 22, 1958, the Fruit and Vegetable Workers' Union, with due notice to its members, held a meeting and amended its constitution to permit merger or affiliation with the proposed new union, Local 1572. Local 1572 was actually chartered by the Canadian Labour Congress on November 28, 1958. The new local accepted as members the vast majority of the employees with the approval of the Fruit and Vegetable Workers'

[1] (1962), 37 W.W.R. 353, 32 D.L.R. (2d) 440

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Union. On January 16 and 17, 1959, at a convention of the old union, it unanimously resolved to merge with and become part of the new union and to change its name accordingly. After January 17, 1959, the individual locals of the Fruit and Vegetable Workers' Union passed similar resolutions approving such merger and change of name.

On March 24, 1959, the appellant union applied to the Board for a change of the name appearing on the Certificate of Bargaining Authority, dated July 24, 1952, from locals of the old union to that of the new union. This application, made on the Board's usual form, states that the reason for the application is "merger and change of name". Regulation 9(*a*), made under the authority of s. 63 of the *Labour Relations Act,* 1954 (B.C.), c. 17, now R.S.B.C. 1960, c. 205, provides a procedure on applications to the Board under s. 65(2) of the Act where a trade union desires a change of name on a certificate due to merger or other circumstances. I emphasize at this point that no interested person could have understood that what was being done was a mere change of name. It was obviously both merger and a change of name.

The Board's order is dated May 25, 1959, and reads as follows:

VARIATION OF CERTIFICATE

WHEREAS by Certificate issued the 24th day of July, 1952, the Fruit and Vegetable Workers Unions, Locals Nos. 1, 2, 3, 4, 5, 6, 8, 9, and 11, were certified for a unit employed by twenty-three employers in thirty packing-houses in the Okanagan Valley;

AND WHEREAS it has been shown to this Board that each of the said unions has changed its name to B.C. Interior Fruit and Vegetable Workers Union, Local No. 1572;

AND WHEREAS the Labour Relations Board is satisfied that the employees in the unit to which this Certificate relates desire the requested change in name of the certified trade unions;

NOW THEREFORE, pursuant to Section 65(2) of the Labour Relations Act, the said Certificate of the 24th day of July, 1952, is varied by deleting therefrom the names Fruit and Vegetable Workers Unions, Locals No. 1, 2, 3, 4, 5, 6, 8, 9, and 11, and by inserting in their place and stead the name B.C. Interior Fruit and Vegetable Workers Union, Local No. 1572.

The order of the Board makes no express reference to merger but it does recite that it exercised its powers under s. 65(2) of the *Labour Relations Act.* By implication there

is a reference to merger because the names of Locals 1, 2, 3, 4, 5, 6, 8, 9 and 11 are deleted and the name of Local 1572 is substituted.

The issue is whether the Board had power to do this under s. 65(2) of the Act, which reads:

> 65. (2) The Board may, upon the petition of any employer, employers' organization, trade-union, or person, or of its own motion, reconsider any decision or order made by it under this Act, and may vary or revoke any such decision or order.

The majority in the Court of Appeal held that the Board's power under s. 65(2) and regulation 9(*a*) was limited to the substitution of a new name for an old and that the word "vary" in s. 65(2) could not support the substitution of another union for that set out in a Certificate of Bargaining Authority. That would amount to a new and different certification, a replacement of one union by another, a change that could only be brought about by following the procedure laid down by ss. 10 and 12. The decision is that Local 1572, being a new union, should have applied for certification and not variation of an existing certificate and that variation of a certificate in the circumstances of this case was beyond the powers of the Board. The learned judge of first instance and Davey J.A., in the Court of Appeal, were of a contrary opinion and held that the Board had jurisdiction under s. 65(2). I am of the opinion that this is the correct view to take of the Act.

There is no dispute that the procedure of the Board under s. 65(2) was correct. Every interested party had knowledge of what was being done and was given an opportunity to be heard. It is of some significance that out of 23 employers, only this particular respondent-employer opposed the application. That, of course, does not cure a defect if it is one of lack of jurisdiction.

It is equally beyond dispute that no attempt was made to proceed under ss. 10 and 12 of the Act dealing with certification and decertification. The gist of the decision of Davey J.A., with which I fully agree, is that it was unnecessary to proceed under ss. 10 and 12 and that the certification procedures of s. 10 and s. 12 of the Act were appropriate when a union seeks initial certification or contending unions seek certification but not to the case of a successor union resulting from a merger or reorganization. He held that s. 65(2) conferred upon the oBard an entirely independent

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power to vary or revoke a former order in appropriate circumstances and that this included power to deal with cases not specifically provided for by the Act and which were outside the ordinary operation of s. 10 and s. 12.

This recognition of a plenary independent power of the Board under s. 65(2) of the Act has the support of two prior decisions, that of Clyne J. on the British Columbia Act in *In re Hotel and Restaurant Employees' International Union, Local 28 et al.*[1], and that of McRuer C.J.H.C. and the Court of Appeal in *Regina v. Ontario Labour Relations Board, Ex parte Genaire Ltd.*[2], where the corresponding section of the Ontario *Labour Relations Act* was considered. It is, in my opinion, a very necessary power to enable the Board to do its work efficiently and the present case affords an illustration of the need for it. Employees in a certain industry, organized in nine locals, decide to combine in one local of a new union, which performs the same function as the fragmented union and presents a continuity of interest, property, management, representation and personnel.

When met with an application by a successor union, what useful purpose could the Board serve by compelling decertification proceedings for the nine old locals and an application for certification of the new local 1572 when all this could be done on notice to the interested parties under s. 65(2)? The essential problem before the Board was one of representation of a group of employees and concepts concerning change of entity, derived from the law of companies, afford no assistance to its solution. Obviously Local 1572 was a new and different association of employees but it was a successor union.

The proper record of this case consists only of the petition of Local 1572 and the decision of the Board. Anything else is extraneous and inadmissible. There is no error in either fact or law on the face of the record. Much of the material in the appeal book was intended to show that certain employees of the respondent Oliver Co-Operative Growers Exchange did not like what had been done. There was no admissible evidence to show this but, even if there were, it does not supply a foundation for an application to quash

[1] (1954), 11 W.W.R. (N.S.) 11 at 17, [1954] 1 D.L.R. 772.

[2] [1958] O.R. 637, affd. (1959), 18 D.L.R. (2d) 588, *sub nom. International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board.*

by way of *certiorari*. This was a matter entirely for the Board's consideration within the exercise of its powers under s. 65(2).

It was also suggested that regulation 9(*a*) was an attempt by the Board to extend its jurisdiction beyond the Act. I do not so regard it. Section 65(2) gives the Board power to vary or revoke any decision or order. All that regulation 9(*a*) is saying is that the Board will consider the exercise of this power where "due to merger or other circumstances" a certified trade union changes its name from that which appears on the certificate. This is not an attempt to legislate by way of regulation in a manner not authorized by the Act.

I would set aside the judgment of the Court of Appeal, dismiss the application to quash the certificate or decision of the Board and restore the judgment on the hearing. The respondent in this Court, Oliver Co-Operative Growers Exchange, should pay to Local 1572 its costs in the Court of Appeal and in this Court, and to the Labour Relations Board its costs in this Court.

The judgment of Cartwright and Ritchie JJ. was delivered by

RITCHIE J.:—The circumstances giving rise to this appeal are stated by my brother Judson whose reasons for judgment I have had the benefit of reading and with whose disposition of this appeal I am in full agreement. I reach the same result by a slightly different process of reasoning and will accordingly state my reasons briefly.

Paragraph 5 of the petition, pursuant to which the order of May 25, 1959, was granted, reads as follows:

> 5. Has the change of name of the trade union been approved by the membership affected?
>
> Yes.
>
> In what manner?
>
> Through merger, and change of name by resolution, adopted at a meeting of Local Unions No. 1, 2, 3, 4, 5, 6, 8, 9, 11, and later at a convention of the F.F.V.W.U. Further, Locals No. 1, 2, 3, 4, 5, 6, 8, 9, 11, and their members were merged with Local No. 1572 by resolution adopted at a meeting of Local No. 1572 held on March 15, 16, 17, 1959.

It is apparent that in the view of all the unions and their members a merger had been completely effected by March 17, 1959, with the result that the old unions had ceased to exist and all their rights, jurisdiction, assets and

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Ritchie J.

liabilities had become vested in the new union, but the status of all these unions as bargaining representatives for their members is circumscribed by the provisions of the *Labour Relations Act,* and until the Labour Relations Board cancelled the certificate of Locals Nos. 1, 2, 3, 4, 5, 6, 8, 9 and 11 in the manner provided by that Act they remained, for all purposes of the Act, the bargaining representative of the employees in the unit concerned. The new union (Local 1572), on the other hand, could not achieve that status until the Board granted certification in its name.

The *Labour Relations Act* makes specific provision by s. 12(10)(*a*) for cancellation of certification at any time when the Labour Relations Board is satisfied that the certified union "has ceased to be a trade union". The respondent, who challenged the Board's jurisdiction, has failed to show that the provisions of this section were not complied with, and as I am of opinion that the Board had ample ground for being satisfied that the old unions had ceased to exist, I think it is to be taken that it was so satisfied and that the requirements of the section were, therefore, fulfilled. I do not think that the omission to refer to s. 12(10)(*a*) in the order of May 25, 1959, in any way detracts from the validity of the cancellation of certification of the old unions which that order effected.

The certification of Local 1572, which, in my view, was also effected by the last-mentioned order, stands on an entirely different footing because at the time when that order was granted the *Labour Relations Act* contained no provision specifically dealing with the certification of a new trade union with which a certified bargaining representative had merged and the validity of the order in this regard must, therefore, depend upon the scope of the authority accorded to the Board by s. 65(2) pursuant to which it was granted.

I do not think that the provisions of s. 65(2) which are reproduced in the reasons of Judson J. clothe the Board with authority to ignore specific provisions of the Act and to so vary its orders as to achieve by a "short cut" a result which under the Act can only be achieved by taking certain specified steps. However, when it is apparent that the Board's existing order no longer reflects the true situation and when the Board is satisfied that that order should be varied in order to give effect to the true purposes of the certification and is satisfied also that there are no provisions

of the Act which specifically cover the situation, then, in my opinion, the Board is justified in exercising the authority conferred on it by s. 65(2). It seems to me that the Board was faced with such a situation in the present case, and that it is to be taken as having been satisfied that the certified unions had ceased to exist and that the majority of the employees of each of the employers concerned were members of the new union. Under these circumstances, I am of opinion that the Board was acting within the scope of the authority conferred by s. 65(2) when it granted the order of May 25, 1959, and so varied the original order of certification as to recognize Local 1572 as the bargaining representative of the unit.

In all other respects, I am in agreement with the reasons of Mr. Justice Judson.

Appeal allowed with costs.

Solicitors for the appellant Board: Paine, Edmonds, Mercer & Williams, Vancouver.

Solicitor for the appellant Union: A. B. Macdonald, Vancouver.

Solicitors for the respondent: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

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THE METROPOLITAN TORONTO AND REGION CONSERVATION AUTHORITY ..... APPELLANT;

*May 22, 23, 24 Oct. 2

AND

VALLEY IMPROVEMENT COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Land taken by conservation authority—Order of Ontario Municipal Board fixing compensation—Appeal on questions of law and jurisdiction—Court of Appeal without jurisdiction to determine amount of compensation—Matter returned to Board to be dealt with in accordance with opinion of Supreme Court.

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Martland and Judson JJ.

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The respondent company was the owner of a parcel of land on which it had a restaurant and an administration building, together with parking areas, tennis courts and bowling greens. The company proposed to build a motel on a certain part of its holding. In January 1956 a meeting was held with the municipality to discuss the project, and, as the building would require a change in existing zoning regulations, it was suggested that the respondent make a formal application for such rezoning; however an application was not made. On August 20, 1958, the appellant conservation authority expropriated a portion of the respondent's lands, thereby making the erection of the proposed motel impossible. The municipality had passed a by-law on November 5, 1956, which prohibited the erection of buildings or structures for residential or commercial purposes in an area including the lands in question. This by-law was approved for a period ending June 15, 1957; there was no application for extension of the approval, nor was the by-law repealed. Another zoning by-law similar to the one of November 5, 1956, was passed on May 4, 1959.

The respondent claimed $85,500 as compensation; the appellant's expropriation advisory board recommended an amount of $2,700. The Ontario Municipal Board fixed the compensation at $3,370.40, but added nothing on the ground of possible rezoning. The respondent obtained leave to appeal upon certain questions of law and jurisdiction and the Court of Appeal allowed the appeal, ordering that the compensation be increased to $77,313. The appellant in appealing to this Court questioned the correctness of the answers made by the Court of Appeal and submitted that, in any event, that Court had no jurisdiction to determine the amount of compensation to be awarded.

Held (Judson J. dissenting in part): The appeal should be allowed and the matter returned to the Municipal Board to be dealt with in accordance with the answers, as set out in the judgment of the majority of this Court, to the questions upon which leave to appeal was granted.

Per Kerwin C.J. and Cartwright, Fauteux and Martland JJ.: *The Judicature Act* by s. 26(2) provided that "the Court of Appeal also has jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature", but did not enlarge the jurisdiction conferred upon that Court by s. 22(10) of *The Conservation Authorities Act,* R.S.O. 1950, c. 62, as amended, and by s. 98(1), (3) and (7) of *The Ontario Municipal Board Act,* R.S.O. 1950, c. 262, as amended. No authority was found in *The Conservation Authorities Act* or *The Ontario Municipal Board Act* to give a judgment but only an opinion on a question of jurisdiction or law, which opinion was directed to be acted upon by the Board, who "shall make an order in accordance with such opinion". This required the opinion of the Court of Appeal to be applied and made effective by an order of the Board.

Accordingly, the Court of Appeal did not have jurisdiction to determine the amount of compensation payable to the respondent. It also appeared that in arriving at the figure which it fixed the Court of Appeal drew an inference or made a finding of fact inconsistent, and indeed, directly at variance, with the finding of fact expressly made by the Board, "that there was not a reasonable probability of the desired zoning being realized". *Re Hollinger Consolidated Gold Mines*

Ltd. and Township of Tisdale, [1931] O.R. 640, distinguished; *Re Bloor Street Widening* (1925-26), 58 O.L.R. 230 and 511, discussed; *Re Casa Loma* (1927-28), 61 O.L.R. 187, referred to.

The most important factor in deciding the amount of compensation in this case was the probability or improbability of the respondent being able to have its lands rezoned to permit the erection of apartment houses. Whether such a probability existed at the date of the expropriation and, if it did exist, its degree were both questions of fact on which the decision of the Board was final unless in arriving at its decision it erred in some matter of law. The inquiry as to whether it had so erred was not at large but was limited to a consideration of the questions on which leave to appeal was granted.

(1) The Board erred in law in directing itself that the effect of the by-law passed on November 5, 1956, was to require the compensation for the lands expropriated to be fixed on the assumption that they were an entity separate from the remainder of the lands of the owner and that the owner could never acquire or use them.

(2) The Board did not err in considering the effect of the similar by-law passed on May 4, 1959. It referred to it only as showing that its conclusion reached on the circumstances at the date of the expropriation had received subsequent confirmation.

(3) Nor did the Board err in considering and making findings with respect to the state of mind of the municipality and the conservation authority.

(4) There was evidence upon which the Board could presume that the planning board of the municipality would consult with the conservation authority prior to dealing with applications before it for rezoning.

(5) The Board did not err in law in giving effect to that presumption.

(6) Assuming this to be a matter of law, there was evidence to support the Board's finding that in the opinion of the planning director of the municipality the highest and best use of the respondent's top lands would be a public use.

Per Judson J., *dissenting:* The Board did not err in considering the effect of the by-law passed on November 5, 1956. It found "that there was no reasonable probability of the desired zoning being realized". If the reasons of the Board were taken as a whole, the mention of severance did not mean anything more than the lack of this reasonable probability of rezoning the whole area including the expropriated land. This was not error in law. The expropriated lands could only have value to the owner of the amount assigned to them by the respondent if they remained part of the whole and were rezoned.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from an expropriation award by the Ontario Municipal Board. Appeal allowed, Judson J. dissenting in part.

Hon. R. L. Kellock, Q.C., and *D. R. Walkinshaw, Q.C.,* for the appellant.

J. T. Weir, Q.C., and *B. H. Kellock,* for the respondent.

[1] [1961] O.R. 783, 29 D.L.R. (2d) 593.

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METROPOLITAN TORONTO AND REGION CONSERVATION AUTHORITY v. VALLEY IMPROVEMENT CO. LTD.

The judgment of Kerwin C.J. and of Cartwright, Fauteux and Martland JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from an order of the Court of Appeal for Ontario[1], made on July 22, 1961, answering certain questions and ordering that the compensation allowed to the respondent for a portion of its lands expropriated by the appellant be increased from the sum of $3,370.40 fixed by the Ontario Municipal Board to the sum of $77,313. The appellant questions the correctness of the answers made by the Court of Appeal and submits that, in any event, that Court had no jurisdiction to determine the amount of compensation to be awarded.

The appellant is a corporate body created by chapter 9 of the Statutes of Ontario, 4-5 Elizabeth II, 1956, which amended *The Conservation Authorities Act,* R.S.O. 1950, c. 62. Under clause (*c*) of s. 15 of the last mentioned Act the appellant had power to expropriate any land it might require for the purposes of carrying out a scheme under the Act. Pursuant to this power, on August 20, 1958, it expropriated 3.47 acres of land owned by the respondent.

The respondent claimed $85,500 as compensation. The Expropriation Advisory Board of the appellant, on December 12, 1958, recommended that the compensation be fixed at $2,700. The respondent served a notice of dissatisfaction and on August 26, 1960, the Ontario Municipal Board made an order fixing the compensation at $3,370.40 with interest at 5 per cent from the date of taking. On November 18, 1960, the Court of Appeal made an order giving the respondent leave to appeal to that Court "upon the following questions of law and jurisdiction:—"

1. Did the Ontario Municipal Board err in considering the effect of by-law 10370 of the Township of Etobicoke;

2. Did the Ontario Municipal Board err in considering the effect of a by-law passed by the Township of Etobicoke on the 4th day of May, 1959;

3. Did the Ontario Municipal Board err in considering and making findings with respect to the state of mind of the Municipal Corporation and the Conservation Authority;

[1] [1961] O.R. 783, 29 D.L.R. (2d) 593.

4. Was there any evidence upon which the Ontario Municipal Board could presume that the Planning Board of the Township of Etobicoke would consult the Conservation Authority prior to dealing with any applications before it for re-zoning;

5. If there was any such evidence, did the Ontario Municipal Board err in law in giving effect to that presumption;

6. Did the Ontario Municipal Board err in failing to allow to the appellant damages claimed by reason of the proposed use of land of alleged higher value in place of the land expropriated for the purpose of carrying out the proposed undertaking of the appellant;

7. Was there any evidence to support the finding of the Ontario Municipal Board that in the opinion of the Planning Director of the Township of Etobicoke the highest and best use of the appellant's top lands would be a public use.

The Court of Appeal on July 22, 1961, gave judgment directing that questions 1, 2, 3 and 5 be answered in the affirmative and that questions 4, 6 and 7 be answered in the negative and ordering that the compensation allowed the appellant pursuant to the order of the Ontario Municipal Board be increased to the sum of $77,313.

Prior to the expropriation the respondent was the owner of 10.8 acres of land in the Township of Etobicoke bounded on the north by Old Mill Road, on the east by the Humber River, on the west by Humber Boulevard, and on the south by Bloor Street. The elevation of the respondent's land varies from approximatley 252.5 feet above sea level at the bank of the Humber River to approximately 295 feet above sea level on the table-lands to the west of the valley.

Of the total holding of 10.8 acres, 3.28 acres was occupied or used in conjunction with the existing buildings on the south side of Old Mill Road, described as the Old Mill Restaurant and the Administration Building used by the respondent and other tenants; of the remaining 7.52 acres, 2.6 acres was used for tennis courts and bowling greens; 1.45 acres was table-land referred to as park land; .85 acres was embankment; .9 acres was valley land being prepared for use as parking space and 1.72 acres was unused valley land.

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Cartwright J.

The 3.47 acres expropriated was made up of the .9 acres of valley land being prepared for parking space, .85 acres embankment land and 1.72 acres of unused valley land. Speaking generally the valley land is that land reasonably flat in contour adjacent to the river, the embankment land is the portion between the top and the toe of the embankment rising steeply from the valley to the table-land and the table-land is that above and beyond the top of the embankment.

Parking accommodation for the occupants of the respondent's building and the guests of its restaurant was provided in three locations; a small area adjacent to the administration building accommodated 30 cars; a second area on the north side of the Old Mill Road accommodated 50 cars; an area on the south side of Old Mill Road to the east of the restaurant accommodated 140 cars. At the time of the expropriation a further area of .9 of an acre on the south side of Old Mill Road at the north-east corner of the respondent's lands was being prepared to accommodate 96 cars, the necessary filling having been completed to the extent of about 70 per cent.

On the west side of Humber Boulevard opposite to the respondent's land are "sixplexes" and "eightplexes". On the south side of Bloor Street opposite to the respondent's land apartment buildings have been erected. On the northwest corner of Humber Boulevard and Bloor Street there is a gasoline service station. On the north side of Old Mill Road opposite to the lands of the respondent are "double-duplexes". There are no single family homes on Humber Boulevard between Bloor Street and Old Mill Road.

On April 4, 1955, the Township of Etobicoke passed by-law 9454, entitled "Restricted Area (Zoning) By-Law of the Township of Etobicoke", under which the whole 10.8 acres of the respondent's lands formed part of Greenbelt Zone "G". The use of lands in this zone for any business purpose is prohibited and the only residences permitted are one-family detached dwellings each with a minimum lot area of 1 acre. As the use made of the land by the respondent was in existence at the date of the by-law, it was a legal non-conforming use after the by-law was passed. In October 1955 the Committee of Adjustment of the Township of Etobicoke authorized an extension to the respondent's buildings by the addition of dining-room space.

In November 1955 the respondent had consulted architects with reference to a proposed motel along the crest of the bank. In the following month the architects submitted sketch plans for such a building extending over the edge of the embankment. In January 1956 representatives of the respondent met with members of the township planning board to discuss the proposed plan. As the proposed building would require a change in the existing green belt zoning, the board suggested that the respondent make a formal application for such rezoning accompanied by the data normally required in such applications.

Subsequently the respondent did some soil sampling work; it received more detailed plans from its architects in May 1956 and some preliminary cost estimates from contractors in June or July of 1956. Nothing further was done by the respondent with regard to the project up to the date of the expropriation, and in particular no complete working drawings were produced, no application was made for a building permit and no application for rezoning was made.

On November 5, 1956, by-law 10370 was passed by the Township of Etobicoke prohibiting the erection of buildings or structures for residential or commercial purposes between the lines shown on maps attached to the by-law which ran approximately along the contour of 267.5 feet above sea level on either side of the Humber River. This by-law was approved by the order of the Ontario Municipal Board dated March 15, 1957, for a period ending June 15, 1957. The township did not apply for extension of this approval, nor was the by-law repealed.

In 1957 the appellant had prepared a scheme to acquire all the lands in the Lower Humber Valley from Dundas Street to the mouth of the Humber River, which include the lands here in question, in order to straighten the river bed and build works to prevent damaging floods such as were caused by Hurricane Hazel in October 1954. This scheme was approved by the Provincial Government and the member municipalities of the appellant, and the appellant began acquiring the lands in the valley for this purpose. It was in pursuance of this scheme that the lands of the respondent were expropriated on August 20, 1958.

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On May 4, 1959, the Township of Etobicoke passed by-law 11757, which was similar in terms to by-law 10370. The by-law was approved by the Municipal Board on October 13, 1959.

The Ontario Municipal Board based its award on a valuation of $739 per acre for the 3.47 acres taken (plus an allowance of $500 to cover the expenditure in preparing the .9 acres for parking and an additional 10 per cent for forcible taking). There was evidence to support the figure of $739 per acre, unless it should be held either (i) that the lands taken might have been rezoned to permit the erection of the proposed hotel building or (ii) that the "table-lands" might have been rezoned to permit the erection of apartment houses. In the latter alternative the ownership of the lands taken would have added to the value of the "table-lands" as, under the existing by-laws, the number of apartment suites which were permitted to be constructed on a parcel of land was proportional to the area of that parcel. It was stated in argument that had the table-lands been rezoned to permit the erection of apartments, the ownership of the expropriated lands would have permitted the building of seventy-six more suites than would be permitted lacking that ownership. I did not understand this statement to be challenged.

The Ontario Municipal Board came to the conclusion "that there was not a reasonable probability of the desired zoning being realized" and added nothing to the compensation on the ground of possible rezoning.

The Court of Appeal was of opinion that if the respondent's lands were rezoned to permit the erection of apartment houses all of its lands except the .85 acres of the embankment would have a value of $40,000 per acre, but that this value should be discounted by 33⅓ per cent because of the "uncertainties and delays implicit in the necessity of obtaining appropriate re-zoning".

Before turning to a consideration of the seven questions it will be convenient to consider the extent of the jurisdiction of the Court of Appeal as our duty, if this appeal succeeds, is to give the judgment which that Court should have given.

The limited right of appeal from the decision of the Ontario Municipal Board is set out in s. 22(10) of *The Conservation Authorities Act,* R.S.O. 1950, c. 62, as amended by 1952, Statutes of Ontario, c. 11, s. 7. Subsection (10) reads as follows:

(10) The Ontario Municipal Board shall have authority to determine the amount of compensation payable and its decision shall be final and shall not be open to appeal except that an appeal shall lie to the Court of Appeal upon a question of jurisdiction or upon a question of law in the manner and under the conditions set out in section 98 of The Ontario Municipal Board Act, and that section shall apply mutatis mutandis.

The relevant provisions of s. 98 of *The Ontario Municipal Board Act,* R.S.O. 1950, c. 262, as amended by 1956, Statutes of Ontario, c. 60, s. 10, are subsections (1), (3) and (7) which read as follows:

(1) Subject to the provisions of Part IV, an appeal shall lie from the Board to the Court of Appeal upon a question of jurisdiction or upon any question of law, but such appeal shall not lie unless leave to appeal is obtained from the Court within one month after the making of the order or decision sought to be appealed from or within such further time as the Court, under the special circumstances of the case, shall allow after notice to the opposite party stating the grounds of appeal.

(3) On the hearing of any appeal the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary for determining the question of jurisdiction or law, as the case may be, and shall certify its opinion to the Board and the Board shall make an order in accordance with such opinion.

(7) Save as provided in this section and in sections 46 and 97,

(*a*) every decision or order of the Board shall be final; and

(*b*) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court.

With respect, I have reached the conclusion that, in the case at bar, the Court of Appeal had no jurisdiction to fix the amount of the compensation. *The Judicature Act* by s. 26(2) provides that "the Court of Appeal also has jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature", but does not enlarge the jurisdiction conferred upon that Court by the provisions of *The Conservation Authorities Act* and *The Ontario Municipal Board Act* quoted above.

In supporting the jurisdiction of the Court of Appeal Mr. Weir referred to the following two cases.

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Re Hollinger Consolidated Gold Mines Ltd. and Township of Tisdale[1] was a case in which the appeal from the Ontario Railway and Municipal Board was brought under s. 83 of *The Assessment Act*, R.S.O. 1927, c. 238. Subsections (6) and (7) of that section read as follows:

> (6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Municipal Board.
>
> (7) The practice and procedure on the appeal to a Divisional Court shall be the same *mutatis mutandis* subject to any rule of court or regulation of the Board as upon an appeal from a county court.

Owing to the difference in wording between those subsections and the ones with which we are concerned this decision is not of assistance.

In *Re Bloor Street Widening*[2], an appeal was brought from an order of the Ontario Railway and Municipal Board permitting the City of Toronto to pass a by-law repealing an earlier expropriation by-law. The right of appeal was given by subsections (1) and (3) of section 48 of *The Ontario Railway and Municipal Board Act*, R.S.O. 1914, c. 186, the wording of which is as regards subs. (1) substantially and as regards subs. (3) exactly the same as that of subs. (1) and subs. (3) of s. 98 of *The Ontario Municipal Board Act* which I have quoted above. In the judgment of the Court of Appeal reported at p. 230 it was held by the majority of the Court that the sole question to be determined was one of law—the true construction of a statutory provision—that the Board had erred in its construction and that on the true construction the Board was without jurisdiction to make the order permitting the repeal. The reasons of the majority directed that the appeal be allowed with costs "here and below". The report at p. 511 is that of the judgment of the Court of Appeal, similarly constituted, on a motion to vary the decision, reported at p. 230, by eliminating the part dealing with the costs before the Board upon the ground that these costs were in the discretion of the Board and the Court of Appeal had no jurisdiction over them. The motion was dismissed, Hodgins and Ferguson JJ.A. dissenting.

[1] [1931] O.R. 640.

[2] (1925-26), 58 O.L.R. 230 and 511.

If it be assumed that the judgment of the majority was right, it decides that in a case where the decision of the question of jurisdiction or law submitted to the Court of Appeal, pursuant to subs. (1) and subs. (3) referred to above, of necessity disposes of the whole matter which was before the Board, the Court of Appeal can deal with the costs of the proceedings before the Board, and it does not appear to me to be of any great assistance to the respondent in the case before us. However, in my respectful opinion, the reasoning of Hodgins J.A. in his dissenting judgment, concurred in by Ferguson J.A., is to be preferred to that of the majority.

Because of differences in the names of the applicable statutes and in the numbering of sections, I shall, in the following paragraph, paraphrase, instead of quoting verbatim, the reasons of Hodgins J.A. at p. 515.

By s. 26(2) of *The Judicature Act* the Court of Appeal is given jurisdiction as provided by any act of the Legislature. It is under this section that an appeal from the Board is possible. To find what that jurisdiction is in this case one must go to *The Conservation Authorities Act* and *The Ontario Municipal Board Act* which determine the powers of the Court of Appeal in the matter. In these there is found no authority to give a judgment (to which s. 27 of *The Judicature Act* might well apply) but only an opinion on a question of jurisdiction or law, which opinion is directed to be acted upon by the Board, who "shall make an order in accordance with such opinion". This requires the opinion of the Court of Appeal to be applied and made effective by an order of the Board.

This reasoning of Hodgins J.A. strengthens the opinion I have formed from a consideration of the wording of the applicable statutory provisions, all of which I have quoted, that the Court of Appeal did not have jurisdiction to determine the amount of compensation payable to the respondent. It would also appear that in arriving at the figure which it fixed the Court of Appeal drew an inference or made a finding of fact inconsistent, and indeed, directly at variance, with the finding of fact expressly made by the Board, "that there was not a reasonable probability of the desired zoning being realized".

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In the course of the argument reference was made to the following statement in the reasons of Middleton J.A. in *Re Casa Loma*[1]:

> The motion before us is under sec. 48 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, which gives the right of appeal from the decision of the Board "upon a question of jurisdiction or upon any question of law" if leave is obtained from this Court.
>
> Before we can grant leave we must determine whether the question which it is sought to argue upon the appeal falls within the statutory category and is a "question of jurisdiction" or "a question of law", and our decision upon the question is final and cannot be reconsidered upon the argument of the appeal: *Re Bloor Street Widening.*

This statement was not necessary to the decision of the application and, with respect, I am of opinion that it is inaccurate. It is contrary to what was decided on this point in *Re Bloor Street Widening* on which it purports to be based. At p. 236 of the report of that case the same learned Justice of Appeal said:

> An appeal can be had only upon a question of jurisdiction, or on any question of law (sec. 48(1) of the Ontario Railway and Municipal Board Act), and in granting leave it was intended to reserve to the Court hearing the appeal power to determine whether the question raised by the appeal came within these words, and it is now argued that the appeal does not raise either a question of jurisdiction or of law.

Middleton J.A. proceeded to consider at length whether the question on which leave to appeal had been granted was one of jurisdiction or law and decided, with the concurrence of the majority, that it was "both a question of jurisdiction and of law".

The circumstance that the Court of Appeal in granting leave to appeal pursuant to s. 98(1) of *The Ontario Municipal Board Act* has described certain questions as being questions of jurisdiction or of law does not deprive the Court which hears the appeal of power to decide whether the questions submitted are in truth such questions.

In approaching the individual questions on which leave to appeal was granted, it is necessary to bear in mind two well-settled principles. First, that the duty of the tribunal empowered to determine the amount of compensation is to arrive at the sum of money which the owner, as a prudent man, at the moment of expropriation would have paid for the land taken rather than be deprived of it. On this point

[1] (1927-28), 61 O.L.R. 187 at 194.

it is sufficient to refer to *Woods Manufacturing Co. Ltd. v. The King*[1]. Second, that in arriving at that sum it is the duty of the tribunal to take into consideration the probability or even the possibility of the rescission of any by-law restricting the use to which the property may be put. On this point reference may be made to two judgments of the Court of Appeal for Ontario; *Re Gibson and City of Toronto*[2], particularly at p. 23, and *Re Forbes and City of Toronto*[3], particularly at p. 39.

The most important factor in deciding the amount of compensation in the present case was the probability or improbability of the respondent being able to have its lands rezoned to permit the uses referred to earlier in these reasons. Whether such a probability existed at the date of the expropriation and, if it did exist, its degree were both questions of fact on which the decision of the Board is final unless in arriving at its decision it has erred in some matter of law. The inquiry as to whether it has so erred is not at large but is limited to a consideration of the questions on which leave to appeal was granted.

Question 1 is as follows:

> Did the Ontario Municipal Board err in considering the effect of by-law 10370 of the Township of Etobicoke?

If the point of law intended to be raised by this question is whether evidence of the fact of the by-law having been passed and of its contents was inadmissible, it is my opinion that it was admissible as showing that on the date of its passing the Council had reached the conclusion that the lands described in it were subject to the risk of being flooded and that no structures for residential or commercial purposes should be erected thereon. This evidence was relevant to the question whether the Council was likely in the future to rezone the lands described in the by-law to permit their use for commercial purposes. The circumstance that the Board had approved the by-law for a limited period only and that the period had expired on June 15, 1957, prior to the date of expropriation might affect the weight of this item of evidence but did not, in my opinion, render it inadmissible. The Board gave consideration to the fact that the Council had not applied for an extension of the Board's

[1] [1951] S.C.R. 504 at 508. [2] (1913), 28 O.L.R. 20.
[3] (1930), 65 O.L.R. 34.

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approval. The Court of Appeal were of the view that the failure of Council to apply for an extension of the approval established conclusively that by June 15, 1957, the township "had as fully abandoned its former intention to control the land affected as if it had rescinded the by-law in question". With respect, this seems to me to be an inference of fact rather than a conclusion of law. If it were regarded as a statement of law it would appear to be at variance with the opinion expressed in the reasons of the Court of Appeal, delivered by Schroeder J.A., in *Re Wright and Burlington*[1].

If this were the only point raised by this question, I would answer it in the negative.

However, Mr. Weir presented argument on another point which appears to me to be raised by the wording of Question 1; his submission is that the Board erred in law in directing itself that the fact of by-law 10370 having been passed had the effect of making the expropriated lands an entity entirely separate from the remainder of the respondent's 10.8 acre parcel so that in fixing the compensation for the lands taken it must not consider any added value to the respondent which those lands had by reason of their forming part of the larger parcel. The Board did not so direct itself in so many words but I am satisfied that it did so in effect.

The reasons of the Board read in part as follows:

> The respondent accepts the value of $739 per acre for the lower lands and called no evidence of value in this regard. He takes the position that the flood zone by-law of the township passed November 5, 1956, had the effect of making the subject lands a separate entity and they cannot thus be considered as adjunct or part of the appellant's remaining lands at the top on the date of expropriation, in spite of the fact that the Corporation did not apply for a further time extension. This course was followed he contends, because the Conservation Authority had not decided what lands they wanted covered, and were negotiating with certain parties for acquisition of land. Meanwhile expropriations by the Authority were taking place up and down the river. Since the expropriation of the subject lands, however, a new flood zone by-law was passed on the 4th day of May, 1959.

The witness Davis, who gave the value of $739 per acre, made it clear that in his opinion the lands taken were worth very many times that amount to the respondent and that the answer in which he gave the figure of $739 was based on the premise, which counsel's question required him to

[1] [1959] O. R. 183, 17 D.L.R. (2d) 537.

accept, that the respondent could never acquire or use them. It is sufficient to quote the following passage from the evidence of Mr. Davis:

Mr. HONSBERGER: Q. I think I will phrase my question this way to see if it will simplify it. The value of that land if it is separated entirely from the top land and cannot be used in conjunction with the top land—is that simpler?

Mr. WEIR: That includes the Old Mill as a purchaser?

Mr. HONSBERGER: I said it can't be used in conjunction with the top land.

Mr. WEIR: I think that is reasonable.

The CHAIRMAN: I think so.

Mr. HONSBERGER: Q. Will you give me that answer? A. If I may qualify my reply, that was the confusion in my mind earlier. To me it was a very hypothetical question. It wouldn't matter much who owned the bottom land as long as the Old Mill had use of them or would be able to buy them. If you exclude that, ask me to exclude that possibility of the Old Mill being able to acquire or use them in any way, shape or form, and they must remain a single entity for time immemorial (sic) . . .

Q. What I said, they can't at any time be attached to the upper lands. A. Yes, then I think the value would be in this neighbourhood of $739.00.

The fact that the Board fixed the value of the lands taken at $739 per acre shows that it did give to itself the direction of which Mr. Weir complains.

In my opinion, it erred in law in so doing. The giving of this direction would inevitably have the effect of rendering it unnecessary for the Board to give the consideration it would otherwise have given to the question of what estimate a prudent man in the position of the respondent would have made, on the date of expropriation, of the probability or possibility of the "table-lands" being rezoned to permit the erection of apartment houses. If the value of the lands taken was to be determined on the assumption that the respondent could never use or acquire them it would be a matter of indifference whether there was any possibility of the "table-lands", as distinguished from the lands taken, being rezoned. If, on the other hand, it was kept in mind that the mere fact of ownership of the lands taken would, in the event of the "table-lands" being rezoned, permit the erection of an additional seventy-six suites, the duty, already alluded to, of taking into consideration and estimating the probability or possibility of amendment of the zoning by-law in regard to the "table-lands" would assume great importance.

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I would answer Question 1 as follows:—"The Board erred in law in directing itself that the effect of this by-law was to require the compensation for the lands expropriated to be fixed on the assumption that they were an entity separate from the remainder of the lands of the owner and that the owner could never acquire or use them."

Question 2 is as follows:

Did the Ontario Municipal Board err in considering the effect of a by-law passed by the Township of Etobicoke on the 4th day of May, 1959?

The by-law referred to in this question is number 11757; its enacting clauses are the same as those of number 10370.

To show how the Board dealt with this by-law in its reasons it is necessary to quote the following passage:

> The evidence as to the flood land character of the subject land is very clearly established. Just as clear was the municipality's intent as to the future use of this property when it passed the original flood land by-law on November 5, 1956. The fact that application was not made to the Board for a time extension of its provisions does not in itself denote any change in the thinking of the Conservation Authority or the Corporation as to the ultimate use of this land.
>
> The top land of the appellant has been zoned green belt for many years, as has the subject lands. No assurances were, or could be given by the Planning Board that the subject lands overlooking the Humber would be rezoned for a hotel use. The necessary rezoning may well have been considered as a primary and vital step even if the work was delayed for the reasons given, but in spite of this the evidence does not indicate any further overtures being made to the Planning Board by the appellant in a period extending over two years. The Board, as it must, has considered carefully the reasonable probability of the lands taken being rezoned. At the time of the first meeting with the Planning Board the appellant's lands were zoned green belt, and it would appear that when it was told to make a formal application for rezoning, this was the only hurdle to be surmounted. Under this prevailing circumstance then, formidable in itself, the appellant was told to make its application. On the 5th day of November, 1956, or 10 months later, By-law 10370 was passed designating the land for which rezoning was sought as flood lands Ex. No. 7 is the Board's order setting forth the temporary approval and its date of expiry June 15, 1957. In the light of these changed conditions, and in spite of the expiration of the temporary approval, it is not unreasonable to assume that the Planning Board in the normal course of its operations would have consulted the Conservation Authority and the council, before recommending any change in zoning, especially since the land had recently been covered by a flood land by-law. Evidence has indicated that the Conservation Authority was expropriating land up and down the river, and even if rezoning of the subject lands had passed the Planning Board level, it would still have to come under the careful scrutiny of council who in the last analysis are the final arbiters.
>
> In all the circumstances and in the light of the evidence, the Board is of the opinion that there was not a reasonable probability of the desired zoning being realized, and this has been borne out by the fact that a new flood land by-law was put on these lands on the 4th day of May, 1959.

By-law 11757 does not appear to have been entered as an exhibit on the hearing before the Board. In the agreement as to the contents of the case on appeal signed by the solicitors for the parties there is the following item:

> By-laws of the Township of Etobicoke, Nos. 10370 and 11757, which were referred to before the Ontario Municipal Board.

The argument of counsel before the Board was not transcribed and we do not know how the by-law was introduced or whether objection was taken to the Board giving consideration to its existence, but this does not seem to me to be of importance. Its relevance, if any, was to the questions whether (i) the lands described in it and in by-law 10370 were, at the date of the expropriation, lands liable to flooding and, (ii) whether they were at that date so regarded by the responsible officers of the township; quite apart from by-law 11757 there was ample evidence to support the view of the Board that both these questions should be answered in the affirmative. As I read the reasons of the Board they do not rest their decision on these points on the passing of by-law 11757, which would be wisdom after the event, but rather refer to it as showing that their conclusion reached on a consideration of the circumstances existing at the date of the expropriation has received subsequent confirmation.

I would answer Question 2 in the negative.

Question 3 is as follows:

> Did the Ontario Municipal Board err in considering and making findings with respect to the state of mind of the Municipal Corporation and the Conservation Authority?

In the passage from the reasons of the Board quoted above they use the expressions, "the municipality's intent as to the future use of this property", and "the thinking of the Conservation Authority or the Corporation as to the ultimate use of this land".

In a frequently quoted passage, applicable to all corporate bodies, Lord Sumner said, in *Inland Revenue Commissioners v. Fisher's Executors*[1]:

> In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention that the company has is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance.

[1] [1926] A.C 395 at 411.

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On the same page Lord Sumner refers to cases in which Atkin L.J., as he then was, used the expression "the intention of the company" and Viscount Cave spoke of "the last thing which the company desired".

When the reasons of the Board are read as a whole it seems clear that these forms of expression were used to state the view of the Board, arrived at on a consideration of the relevant evidence, that in any future action relating to these lands the Council of the Township and the Conservation Authority would proceed on the basis that the lands described in by-law 10370 were liable to be flooded. The Board was engaged at this point in forecasting the probable future actions of the corporate bodies referred to. They did not, in my opinion, err in law. If they erred in their choice of words they appear to have done so in good company.

I would answer Question 3 in the negative.

Questions 4 and 5 were dealt with together by the Court of Appeal. They are as follows:

> 4. Was there any evidence upon which the Ontario Municipal Board could presume that the Planning Board of the Township of Etobicoke would consult the Conservation Authority prior to dealing with any applications before it for re-zoning?
>
> 5. If there was any such evidence, did the Ontario Municipal Board err in law in giving effect to that presumption?

I do not find it necessary to deal with Mr. Kellock's submission that it was the statutory duty of the Planning Board to consult with the Conservation Authority; in my opinion, the circumstances disclosed in the evidence indicated that it would be proper for it to do so and it was reasonable for the Board to make the assumption which it made. With respect, I find myself unable to agree with the view of the Court of Appeal that the reasons of the Board show that it assumed that the Planning Board would fail to retain its autonomy and independence.

I would answer Question 4 in the affirmative and Question 5 in the negative.

The Court of Appeal answered Question 6 in the negative and, before us, neither party sought to vary this answer. Question 7 is as follows:

> Was there any evidence to support the finding of the Ontario Municipal Board that in the opinion of the Planning Director of the Township of Etobicoke the highest and best use of the appellant's top lands would be a public use?

In dealing with this question the Court of Appeal quoted the following passage from the reasons of the Board.

> The Planning Director of the Township of Etobicoke in his evidence said the top lands from the owner's point of view would be suitable for apartments, but gave it his opinion under cross-examination, that the highest and best use of the top lands of the appellant would be for a public use and the land should be precluded from all building.

Read in its context this appears to me simply to form part of the Board's summary of some of the evidence given before it. I find nothing in it to suggest that the Board thought the witness was saying that the best use of the lands from the owner's point of view would be that they should be dedicated to the public. That would have been a self-evident absurdity. The effect of the evidence of this witness appears to be that, in his opinion, although from the owner's point of view the erection of apartment houses on its land would be desirable, from the point of view of the general public it would be best that all building be prohibited. I do not find anything in the reasons of the Board to indicate that it misunderstood or misdirected itself as to the effect of what this witness said. I find it difficult to say that Question 7 is one of law but, on the assumption that it is, I would answer it in the affirmative.

For these reasons I would allow the appeal to the extent indicated and direct that the paragraphs of the order of the Court of Appeal reading as follows:

> THIS COURT DID ORDER that Questions Nos. 1, 2, 3 and 5 be answered in the affirmative and Questions Nos. 4, 6 and 7 be answered in the negative.
>
> AND THIS COURT DID FURTHER ORDER that the compensation allowed the Appellant pursuant to the Order of the Ontario Municipal Board dated August 20th, 1960, be increased to the sum of $77,313.00.

be deleted and that the following be substituted therefor:

> "THIS COURT DID ORDER that Question 1 be answered as follows: 'The Board erred in law in directing itself that the effect of this by-law was to require the compensation for the lands expropriated to be fixed on the assumption that they were an entity separate from the remainder of the lands of the owner and that the owner could never acquire or use them.', that Questions 2, 3, 5 and 6 be answered in the negative and that Questions 4 and 7 be answered in the affirmative.

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AND THIS COURT DID FURTHER ORDER that the matter be returned to the Board to be dealt with in accordance with the answers above set out."

It was necessary for the respondent to appeal to the Court of Appeal and, in turn, it was necessary for the appellant to appeal to this Court. The order of the Court of Appeal as to costs should stand but the appellant is entitled to its costs in this Court and I would so order.

Cartwright J.

JUDSON J. (*dissenting in part*):—I agree with the judgment of Cartwright J. except on question 1. As stated in his reasons, the Board found "that there was no reasonable probability of the desired zoning being realized." If the reasons of the Board are taken as a whole, I do not think that the mention of severance means anything more than the lack of this reasonable probability of rezoning the whole area including the expropriated land. This is not error in law. The respondent's artificial structure of hypothesis collapses when it is realized that it depends upon getting such a decision. These expropriated lands could only have value to the owner of the amount assigned to them by the respondent if they remained part of the whole and were rezoned.

The respondent seeks to build up value in this way. First, there are plans for a motel to be operated in conjunction with its established restaurant. This would involve putting supporting pillars on the lands in question. When expropriation makes this impossible, the motel must be placed on the table-lands, which otherwise would be used for an apartment building. Then the loss of the bottom lands destroys much of the value of the table-lands for an apartment site because the area of the bottom lands could be used as part of the computation of the land required for such a purpose and thus make possible the building of more suites.

The foundation for all this disappears with the finding of fact made by the Board. I would answer question 1 in the negative.

Appeal allowed, JUDSON J. *dissenting in part.*

Solicitors for the appellant: Roebuck & Walkinshaw, Toronto.

Solicitors for the respondent: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

GEORGES BURDETT AND OTHERS (*Plaintiffs*) ..... } APPELLANTS;

AND

JEAN-LOUIS DECARIE AND OTHERS (*Defendants*) ..... } RESPONDENTS.

1962

*May 9, 10
Oct. 2

GEORGES BURDETT (*Plaintiff*) .....APPELLANT;

AND

JEAN-MARIE BEYRIES AND OTHERS (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Substitution—Gift inter vivos—Conditional substitution—Right of donee to dispose of property—Whether donee has right to dispose by will—Civil Code, arts. 782, 952.

A deed, by which a donor made an *inter vivos* gift of certain real properties, contained a stipulation that "in the event of the donee dying without leaving children, or leaving children who died before reaching their majority and left no children, and without having disposed of the property given, such property would go to the sisters of the donee then living and to the children of any deceased sisters, subject nevertheless to the enjoyment of such property by the donee's widow during her life". The donee survived the donor and died without issue after having disposed by will of the said properties in favour of his nephews and nieces.

The sisters instituted this action to claim the property and argued that the word "disposed" meant during the donee's lifetime. The nephews and nieces argued that the will constituted a disposition by the donee and that at his death there was no undisposed property. The trial judge maintained the action, but this judgment was reversed by the Court of Queen's Bench in a majority judgment. The sisters appealed to this Court.

Held: The appeal should be dismissed.

The general word "to dispose" includes testamentary dispositions as well as *inter vivos* dispositions. In the context of this clause as in the context of the deed of donation as a whole, that word could not, in this case, be given a meaning excluding a testamentary disposition. Consequently, the nephews and nieces were entitled to the property given to them by the donee's will.

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*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

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BURDETT *et al.* *v.* DÉCARIE *et al.*

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Jean J. Appeal dismissed.

Jean Duchesne, for the plaintiffs, appellants.

Godefroy Laurendeau, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

FAUTEUX J.:—Par acte authentique, fait et signé à Montréal le 17 juin 1914, Benjamin Décarie fit donation entre vifs de certains immeubles à son fils Etienne acceptant, le donateur se réservant l'usufruit de ces biens sa vie durant. L'acte contient la clause suivante donnant lieu au présent litige:

> Il est encore expressément stipulé que dans le cas où le dit Etienne Décarie, le donataire, viendrait à décéder sans laisser d'enfant ou, qu'en ayant, il vînt ou vinssent à décéder en minorité et sans laisser d'enfant, et sans avoir disposer (sic) des propriétés présentement donnés (sic), les dites propriétés appartiendront dans ce cas aux sœurs qui seront alors vivantes du dit Etienne Décarie et celles qui seront décédées seront représentées par leurs enfants à l'exclusion de tous autres, sujet néanmoins à la jouissance que la veuve du dit Etienne Décarie aura des dites propriétés sa vie durant et tant qu'elle gardera viduité seulement.

Benjamin Décarie est décédé en 1926. Etienne Décarie, son fils, est décédé le 3 février 1954, sans postérité et après avoir, par testament, disposé en faveur de ses neveux et nièces, petits-neveux et petites-nièces, des immeubles que son père lui avait ainsi donnés.

Donnant une interprétation différente à la clause précitée, les parties se disputent le droit à ces immeubles. D'accord à reconnaître que suivant cette clause, les sœurs d'Etienne Décarie, vivantes à son décès ou leurs enfants par représentation, ont droit à la propriété des biens donnés si deux conditions s'accomplissent, soit si Etienne Décarie décède sans enfant et s'il décède *sans avoir disposé* de ces biens, les parties se divisent sur le sens à donner, en l'espèce, au terme «disposé». D'une part, les appelants, bénéficiaires de la substitution conditionnelle *de residuo* y stipulée, soumettent que «sans avoir disposé» signifie sans avoir disposé de son vivant; ainsi interprété, cette deuxième condition ne s'étant pas réalisée, vu que les immeubles étaient encore en possession d'Etienne Décarie au moment de son décès, ils auraient

[1] [1961] Que. Q.B. 840, *sub nom. Décarie v. Lemieux.*

droit d'être reconnus propriétaires indivis de ces immeubles, chacun pour la part mentionnée en la demande principale et en la demande incidente. D'autre part, les intimés, légataires d'Etienne Décarie, prétendent que l'expression «sans avoir disposé» n'est pas qualifiée et comprend la disposition testamentaire aussi bien que la disposition entre vifs; il s'ensuivrait, vu qu'Etienne Décarie testa de ces biens en faveur des intimés, que les appelants n'y auraient aucun droit et les demandes principale et incidente en cette cause devraient être rejetées. Telle est en somme la question dominante en cette cause.

La Cour d'Appel[1], par une décision majoritaire, fit droit aux intimés. Dans ses raisons de jugement, auxquelles ses collègues, MM. les Juges Bissonnette et Hyde ont donné leur accord, M. le Juge Tremblay, Juge en chef de la Cour d'Appel, fait un exposé complet des faits et du droit sur les questions pertinentes à la détermination du litige. Rien ne pourrait utilement y être ajouté. Je partage entièrement la conclusion à laquelle il en est arrivé et les motifs sur lesquels il s'appuie. Suivant Pothier, le terme général *disposer* comprend les dispositions testamentaires aussi bien que les dispositions par actes entre vifs. En toute déférence pour MM. les Juges Choquette et Rivard, de la minorité, je ne puis me convaincre que ce terme doive, en l'espèce, pour les raisons par eux données, recevoir dans le contexte de la clause où il se trouve ou dans le contexte de l'acte entier, une signification excluant la disposition testamentaire.

Je renverrais l'appel, tant sur la demande principale que sur la demande incidente, avec dépens.

Appeal dismissed with costs.

Attorneys for the plaintiffs, appellants: Pagé, Beauregard, Duchesne, Renaud & Reeves, Montreal.

Attorneys for the defendants, respondents: Laurendeau & Laurendeau, Montreal.

[1] [1961] Que. Q.B. 840, *sub nom. Décarie v. Lemieux.*

1962
*Oct. 10, 11
Nov. 30

KURT WALTER LEHNERT (*Defendant*) ..... APPELLANT;

AND

STEPHANIE STEIN (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Driver under influence of liquor to extent unable to safely drive his car—Passenger injured in accident—Volenti non fit injuria not applicable—Distinction between physical and legal risk.

Quantum of damages—Trial judge's assessment varied by Court of Appeal—Amount fixed by Court of Appeal not interfered with by Supreme Court.

The defendant met the plaintiff and her lady friend in a downtown restaurant and invited them to accompany him to a suburban night club. The defendant had been drinking, but there was no evidence to indicate the plaintiff knew how much he had consumed prior to his arrival at the restaurant; before leaving the restaurant the plaintiff and her companion had a drink with the defendant. At the night club the defendant was served with approximately 10 ounces of liquor in less than two hours, and during that time his guests accepted one drink each. There was some discussion between the plaintiff and her friend before leaving the club as to ordering a taxi, but the defendant said he would drive them home and they went with him. While driving his car the defendant had an accident, as a result of which the plaintiff suffered serious personal injuries. In an action for damages, the trial judge found that the accident was caused by the gross negligence of the defendant and this finding was not questioned in the Court of Appeal or before this Court. The action was dismissed on the ground that the plaintiff was *volens*. The Court of Appeal, by a majority judgment, allowed the appeal holding that the plaintiff was not *volens* but was guilty of contributory negligence to the extent of 25 per cent. The defendant appealed to this Court.

Held (Kerwin C.J. dissenting): The appeal should be dismissed.

Per Cartwright, Martland, Judson and Ritchie JJ.: The defence of *volenti non fit injuria* did not apply in this case. The plaintiff, although apprehensive that the defendant would drive negligently and that an accident might result, decided to take a chance and go with him; she thereby incurred physical as distinct from legal risk. There was nothing to warrant a finding that she decided to waive her right of action should she be injured or that she communicated any such decision to the defendant. *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*, [1956] S.C.R. 322, applied; *Miller v. Decker*, [1957] S.C.R. 624, distinguished; *Slater v. Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625; *Dann v. Hamilton*, [1939] 1 K.B. 509, referred to.

As to the quantum of damages, this Court is slow to interfere with the amount fixed by a provincial Appellate Court which, as in the present case, has varied the assessment made by the trial judge. The amount fixed by the Court of Appeal was not excessive. *Lang et al. v. Pollard et al.*, [1957] S.C.R. 858, referred to.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

Per Kerwin C.J., *dissenting:* The burden resting upon the defendant of proving that the plaintiff expressly, or by necessary implication, agreed to exempt the defendant from liability for any damages suffered by the plaintiff occasioned by the former's negligence was met.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from a judgment of Campbell J. Appeal dismissed, Kerwin C.J. dissenting.

F. D. Allen, for the defendant, appellant.

J. F. O'Sullivan and *S. I. Schwartz,* for the plaintiff, respondent.

THE CHIEF JUSTICE (*dissenting*):—The question of the applicability of the maxim of *volenti non fit injuria* is settled by the decisions of this Court in *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*[2] and *Miller v. Decker*[3]. Difficulties arise in applying the maxim, as appears from the reasons for judgment in those two cases and in the present appeal. Upon a review of the evidence, I find myself in agreement with Mr. Justice Tritschler, who gives the testimony in detail applicable to the point. It might be noted that the Chief Justice of Manitoba was in error in deciding that the important stage at which the matter should be considered was when the plaintiff left the Ivanhoe and I understand that the other Members of this Court agree that the relevant time was when the plaintiff left the Rancho. For the reasons given by Mr. Justice Tritschler, I have concluded that the burden resting upon the defendant of proving that the plaintiff expressly, or by necessary implication, agreed to exempt the appellant from liability for any damages suffered by the plaintiff occasioned by that negligence has been met.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment at the trial, but there should be no costs of the motion before us to quash the appeal and of the motion for leave to appeal.

The judgment of Cartwright, Martland, Judson and Ritchie JJ. was delivered by

CARTWRIGHT J.:—This appeal raises questions of importance as to the applicability of the maxim *volenti non fit injuria* on which there has been divergence of opinion among the learned judges in the Courts below.

[1] (1962), 37 W.W.R. 267, 31 D.L.R. (2d) 673.
[2] [1956] S.C.R. 322, 2 D.L.R. (2d) 369.
[3] [1957] S.C.R. 624, 9 D.L.R. (2d) 1.

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Cartwright J.

The action was brought by the respondent for damages for serious personal injuries suffered by her while being transported by the appellant in his motor vehicle as his guest without payment for the transportation. The accident happened at about 11.05 p.m. on May 7, 1959; the learned trial judge found that it was caused by the gross negligence of the appellant. This finding which, under the terms of s. 99(1) of *The Highway Traffic Act,* R.S.M. 1954, c. 112, was essential to the respondent's cause of action was not questioned in the Court of Appeal or before us.

The learned trial judge dismissed the action on the ground that the respondent was *volens*. He went on to say that had he held she was not *volens* he would have found her guilty of contributory negligence and apportioned seventy-five per cent of the responsibility to her. He made a provisional assessment of her special damages at $7,850.58 and of her general damages at $12,000.

The Court of Appeal, by a majority judgment, allowed the appeal holding that the respondent was not *volens* but was guilty of contributory negligence to the extent of twenty-five per cent and that her general damages should be assessed at $18,000. Judgment was accordingly entered in her favour for $19,387.93 and costs. Tritschler and Guy JJ.A., dissenting, would have dismissed the appeal.

The appellant asks that the judgment at the trial be restored; alternatively he asks that the findings of the learned trial judge as to the degree of contributory negligence and the quantum of damages be restored.

The respondent supports the judgment of the Court of Appeal and does not attack the finding that she was guilty of contributory negligence to the extent of twenty-five per cent.

The learned trial judge did not regard either the respondent or her companion, Mrs. Hartogsveld, as a convincing witness. The majority in the Court of Appeal did not vary any finding of fact as to the events preceding the moment of the accident on which there was a conflict of testimony, but took the view that the learned trial judge was mistaken in the inferences which he drew from the primary facts.

The defendant filed a statement of defence and was examined for discovery but at the time of the trial his whereabouts were unknown and his defence was conducted

by counsel instructed, pursuant to s. 154 of *The Highway Traffic Act*, R.S.M. 1954, c. 112, by the Provincial Treasurer who also instructed counsel on the appeals to the Court of Appeal and to this Court.

On the day of the accident the defendant was drinking at the noon hour and at dinner-time in the evening; after dinner he proceeded to the Ivanhoe Restaurant in downtown Winnipeg, where he had another drink. At that restaurant he met the plaintiff and her friend, Mrs. Hartogsveld, who were having dinner; he invited them to accompany him to the Rancho Don Carlos, hereinafter referred to as "the Rancho", a night club in the suburbs of the City of Winnipeg, where meals and alcoholic beverages were served and there was a floor show. The plaintiff and Mrs. Hartogsveld had a drink with the defendant before leaving the Ivanhoe and, having accepted his invitation, they left with him for the Rancho and arrived there about 9:00 p.m.

There is no evidence to indicate that the plaintiff knew how much drinking the defendant had done prior to his arrival at the Ivanhoe. It appears that the defendant, who is an architect, was a well-known habitué of the Rancho; the waitresses knew him and knew that he could "handle" a substantial amount of liquor; they served him four "doubles", totalling about 10 ounces of rye whiskey, in less than two hours. The plaintiff knew that the defendant was drinking. The plaintiff and Mrs. Hartogsveld accepted one drink each but refused any more. The waitresses realized that the defendant was getting noisy and thought he had had too much to drink but did not refuse to serve him liquor when he ordered it. The plaintiff did not know the defendant well but had been out with him before. The evidence is silent as to whether he consumed liquor on those occasions, but the plaintiff said on her examination for discovery, which the learned trial judge accepted in preference to her evidence at the trial, that the defendant always drove too fast, paid no attention to any protest, that driving with him made her sick, that she was always afraid of an accident when driving with him and that she was afraid on the drive from the Ivanhoe to the Rancho.

There was some discussion between the plaintiff and Mrs. Hartogsveld before leaving the Rancho as to ordering a taxi in which to go home but the defendant said he would

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drive them home and they went with him. The learned trial judge rejected the explanations of the plaintiff and Mrs. Hartogsveld that they did this because the defendant had their coat checks and they felt under a social obligation to go with him because of the entertainment he had provided for them. The learned trial judge said at this point:

> These excuses are of the weakest nature. Both of these women were sufficiently mature to stand up for themselves but obviously decided to take their chances.

The critical point of time is when the plaintiff got into the defendant's car to be driven home from the Rancho. The finding of the learned trial judge that the condition of the defendant at this point "was produced by a quantity of alcohol sufficient to cause him to lose control of his faculties to such an extent that he was unable to safely drive his car" was supported by the evidence and was not challenged before us.

While it is obvious that the plaintiff knew that the defendant had been drinking, the evidence does not establish that she was aware that he was intoxicated to the extent found by the learned trial judge. The plaintiff deposed that the defendant was not drunk and that he did not appear to have been affected by the liquor he had taken. The witness John Campbell who was with the plaintiff and the defendant during part of the time they were at the Rancho (but not when they left) said that he thought the defendant "was normal". It is of some significance that no one at the Rancho appears to have made any suggestion that the defendant ought not to drive. There is no evidence that the defendant had ever previously been involved in an accident.

After reading all the evidence with care, in the light of the observations made by the learned trial judge as to the reliability of the witnesses, it appears to me that the facts on which, in this case, the applicability of the maxim *volenti non fit injuria* depends may be summarized as follows.

When the plaintiff entered the defendant's car at the Rancho to be driven home she was under no compulsion, legal or practical, to do so. At that moment the defendant was in fact under the influence of liquor to such an extent as to increase the chances of a collision resulting from his negligence and, while I am doubtful whether the evidence establishes it, I assume for the purposes of this appeal that

the plaintiff was aware of this. The plaintiff was afraid to go with the defendant, primarily because on the previous occasions when she had done so he drove too fast and paid no attention to any remonstrance, but also (I will assume) because she knew he had been drinking. In spite of this she went with him because he urged her to do so and she lacked the resolution to refuse.

On these facts I agree with the conclusion of the majority in the Court of Appeal that the maxim has no application.

The decision of this Court in *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*[1] renders it unnecessary to make any lengthy examination of the authorities, which were fully considered in the judgments delivered in that case, particularly in that of Doull J., in the Supreme Court of Nova Scotia (*in Banco*)[2]. That decision establishes that where a driver of a motor vehicle invokes the maxim *volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence, and that, as stated in *Salmond on Torts*, 13th ed., p. 44:

> The true question in every case is: Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?

There is nothing in the reasons delivered in this Court in *Miller v. Decker*[3] to throw any doubt on the principles enunciated in *Seymour's* case. In *Miller v. Decker* the majority were of the view that an agreement of the nature defined in *Seymour's* case should be implied from the active encouragement by the plaintiff of the defendant's conduct which resulted in disaster while the minority took the contrary view. The difference of opinion was not as to the applicable law but as to what inference of fact should be drawn from the primary facts.

[1] [1956] S.C.R. 322, 2 D.L.R. (2d) 369.
[2] (1955), 36 M.P.R. 337.
[3] [1957] S.C.R. 624, 9 D.L.R. (2d) 1.

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I share the view expressed by the Court of Appeal in England in *Slater v. Clay Cross Co., Ltd.*[1], that the judgment of Asquith J., as he then was, in *Dann v. Hamilton*[2] in so far as he decided that the doctrine of *volenti* did not apply was correct.

There is a most useful discussion as to when the defence of *volenti non fit injuria* is admitted in Mr. Glanville Williams' work Joint Torts and Contributory Negligence (1951). At p. 296 the learned author points out that "the scope of the defence has been progressively curtailed since the end of the last century, so that at the present day it is allowed only when there is a positive agreement waiving the right of action".

I wish to adopt the following passages at p. 308 of the last mentioned work:

> It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law.
>
> * * *
>
> To put this in general terms, the defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence.

On the facts of the case at bar the plaintiff, although apprehensive that the defendant would drive negligently and that an accident might result, decided to take a chance and go with him, that is to say, employing the phraseology of the passages just quoted, she thereby incurred the physical risk. In my opinion, there is nothing to warrant a finding that she decided to waive her right of action should she be injured or that she communicated any such decision to the defendant.

It has already been mentioned that counsel for the respondent did not attack the findings made by the majority in the Court of Appeal that the plaintiff was guilty of contributory negligence because her decision to go with the defendant was a failure to take reasonable care for her own

[1] [1956]2 Q.B. 264, [1956] 2 All E.R. 625.
[2] [1939] 1 K.B. 509, [1939] 1 All E.R. 59.

safety and that twenty-five per cent of the responsibility for the accident should be attributed to her. I am unable to agree with the argument of counsel for the appellant that this percentage should be increased.

As to the quantum of damages, this Court is slow to interfere with the amount fixed by a provincial Appellate Court which has varied the assessment made by a trial judge. It is sufficient on this point to refer to the case of *Lang et al. v. Pollard et al.*[1] In the case at bar a perusal of the evidence brings me to the conclusion that the amount fixed by the Court of Appeal is not excessive.

At the opening of the appeal counsel for the respondent moved to quash the appeal and counsel for the appellant, *ex abundanti cautela,* moved for leave to appeal. Both of these motions were dismissed, the costs in each case being reserved. I would now direct that there be no order as to costs in either motion.

I would dismiss the appeal with costs.

Appeal dismissed with costs, KERWIN C.J. *dissenting.*

Solicitors for the defendant, appellant: Aikens, MacAulay, Moffat, Dickson, Hinch & McGivan, Winnipeg.

Solicitors for the plaintiff, respondent: Walsh, Micay, O'Sullivan, Bowman & Schwartz, Winnipeg.

SUNBEAM CORPORATION (CANADA) LTD. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1962
*Nov. 20, 21
Dec. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Whether taxpayer qualified to claim certain deductions by reason of having paid income tax in Quebec—Requirements to constitute a permanent establishment—The Income Tax Act, 1948, s. 31,

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Judson JJ.

[1] [1957] S.C.R. 858, 11 D.L.R. (2d) 161.

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enacted by Statutes of Canada 1952, c. 29, s. 13—Income Tax Act, R.S.C. 1952, c. 148, s. 40, amended by Statutes of Canada 1952-53, c. 40, s. 59(1).—Income Tax Regulations 400, 401, 402, 411(1)(a)(b), (2).

The appellant company, whose head office and plant were in Ontario, manufactured various electrical appliances and equipment which it sold exclusively to wholesale distributors across Canada. As its sales representative in the Province of Quebec in the years 1952, 1953 and 1954, the company employed C from March 31, 1952, to February 10, 1953, and D from April 10, 1953, until a year and a half after the end of 1954. These representatives did not have authority to make contracts on the appellant's behalf and did not keep in Quebec a supply of goods for delivery as a result of sales which they made. Orders were filled from the appellant's plant in Ontario. C and D each maintained an office in his own residence at his own expense and each used his office for doing the paper work involved in the business and for sales demonstration purposes. The company's claim for tax deductions under certain provisions of the Income Tax Regulations on the ground that it had a permanent establishment in Quebec in 1952, 1953 and 1954 was disallowed by the Minister. The Income Tax Appeal Board ruled in favour of the company, but an appeal from this decision was allowed by the Exchequer Court.

Held: The appeal should be dismissed.

The appellant did not have a "permanent establishment" in the Province of Quebec in the years in question. Interpreting those words, apart from the provisions of s. 411(1)(*a*) of the Regulations, the word "establishment" contemplates a fixed place of business of the corporation, a local habitation of its own. The word "permanent" means that the establishment is a stable one, and not of a temporary or tentative character.

Paragraph (*a*) of s. 411(1) of the Regulations defines various kinds of places of business which constitute a permanent establishment. The fact that the appellant's employee, for the discharge of his duties under his contract, set up an office in his own premises did not constitute that office a branch, an office or an agency of the appellant. Such office was not a permanent establishment of the appellant.

Under para. (*b*) of s. 411(1) of the Regulations an employee or agent can be deemed to operate a permanent establishment of a corporation, but only if he has authority to contract for his employer or principal, or if he has a stock of merchandise from which he regularly fills orders which he receives. Neither of these requirements was met in the present case.

The submission that the appellant had a permanent establishment in Quebec, by virtue of subs. (2) of s. 411 of the Regulations, because its sales representatives had "substantial machinery or equipment", varying in value from $4,000 to $11,000, on their premises, in the tax years in question, which they used for sales demonstrations, was rejected. As used in this subsection, the adjective "substantial" was intended to mean substantial in size. The use made by the sales representatives of the appellant's products for sales demonstration purposes did not constitute that kind of "use" which was contemplated by the subsection. In order to come within the subsection, the machinery or equipment would have to be used by the taxpayer for the purpose for which it was created.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], allowing an appeal from a decision of the Income Tax Appeal Board. Appeal dismissed.

J. J. Robinette, Q.C., and *J. A. Langford*, for the appellant.

D. S. Maxwell, Q.C., and *T. Z. Boles*, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This appeal is from a judgment of Cameron J., in the Exchequer Court[1], who allowed an appeal by the respondent from a decision of the Income Tax Appeal Board. The Board had allowed the appellant's appeal from reassessments for income tax for the years 1952, 1953 and 1954.

In issue is the right of the appellant to claim certain deductions from its income tax in each of those years by reason of its having paid income tax in those years in the Province of Quebec. The relevant statutory provisions are s. 37 of *The Income Tax Act* of 1948, as enacted in s. 13 of c. 29 of the Statutes of Canada, 1952, in respect of the year 1952, and s. 40 of c. 148 of the Revised Statutes of Canada, 1952, as amended by s. 59(1) of c. 40 of the Statutes of Canada, 1952-53, in respect of the years 1953 and 1954.

The sole issue is as to whether the appellant qualifies to claim the deductions under the provisions of the Income Tax Regulations and the question for decision is did the appellant, in the years in question, have a permanent establishment in the Province of Quebec?

Sections 400, 401 and 402 of the Income Tax Regulations, as applicable to the 1952 and subsequent taxation years, were made by PC 1953-255 of February 19, 1953. Those sections were later amended by PC 1953-1773 of November 19, 1953, mainly in order to substitute references to s. 40 of c. 148, R.S.C. 1952, for the original references to s. 37 of the 1948 *Income Tax Act*. These sections, as amended, are in part as follows:

400. (1) The Province of Quebec is the province prescribed for the purpose of section 40 of the Act.

[1] [1961] Ex. C.R. 234, [1961] C.T.C. 45, 61 D.T.C. 1053.

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(2) For the purpose of paragraph (*a*) of subsection (1) of section 40 of the Act, the following classes of corporations are prescribed:

(*a*) corporations that are taxable under the provisions of section 3 of the Quebec Corporation Tax Act and that are not taxable under the provisions of section 6 of the Quebec Corporation Tax Act, and

* * *

401. For the purpose of subsection (2) of section 40 of the Act, the amount of taxable income earned in a taxation year in a province shall be determined as hereinafter set forth in this Part.

402. (1) Where, in a taxation year, a corporation had no permanent establishment outside the province, the whole of its taxable income for the year shall be deemed to have been earned in the province.

(2) Where, in a taxation year, a corporation had no permanent establishment in the province, no part of its taxable income for the year shall be deemed to have been earned in the province.

Subsections (3) and (4) are rules for determining the amount of the taxable income earned in the year in the province (Quebec) where a corporation had a permanent establishment in that province and a permanent establishment outside that province. It is unnecessary to refer to them in detail as the parties are agreed that the deductions claimed by the appellant in each of the years in question have been computed in accordance with such rules.

Section 411 of the Regulations reads, in part, as follows:

411. (1) For the purpose of this Part,

(*a*) "permanent establishment" includes branches, mines, oil wells, farms, timber lands, factories, workshops, warehouses, offices, agencies, and other fixed places of business;

(*b*) where a corporation carries on business through an employee or agent who has general authority to contract for his employer or principal or has a stock of merchandise from which he regularly fills orders which he receives, the said agent or employee shall be deemed to operate a permanent establishment of the corporation;

(2) The use of substantial machinery or equipment in a particular place at any time in a taxation year shall constitute a permanent establishment in that place for the year.

The facts are not in dispute. The appellant is a company, incorporated under the laws of Canada, having its head office and manufacturing plant in the Province of Ontario. During the taxation years in question the appellant sold its wares in the Province of Quebec and other provinces of Canada.

The appellant manufactured electrical appliances, cattle clipping and shearing equipment and lawn and garden equipment. These products were sold by the appellant exclusively to wholesale distributors across Canada.

It had four sales representatives, located respectively in Vancouver, Winnipeg, Toronto and Montreal. A large number of sales representatives were not required because of the appellant's policy of selling to wholesale distributors exclusively. In the Province of Quebec there were not more than approximately 25 such distributors, of whom 15 were in the Montreal area.

Approximately 14 per cent or 15 per cent of the appellant's sales by value were made to the 25 distributors in the Province of Quebec. The Quebec sales representative was also responsible for sales to distributors in the Atlantic Provinces, which together, during the taxation years in question, accounted for a further 5 per cent approximately, of the appellant's sales.

In the years 1952, 1953 and 1954, the appellant had a sales representative in the Province of Quebec, a Mr. Comtois, from March 31, 1952, to February 10, 1953, and a Mr. Dyke, from April 10, 1953, until a year and a half after the end of the year 1954.

These sales representatives were employed pursuant to written agreements with the appellant. That with Comtois was for the period from March 31, 1952, to December 27 of that year, with provision for automatic extensions from year to year thereafter, but subject to arbitrary termination at any time on two weeks' written notice by either party. Dyke's agreement ran from April 12, 1953, to December 26 of that year. It had no automatic renewal clause, but was subject to arbitrary termination by either party on two weeks' written notice.

Each contract provided for commission sales by the sales representative in respect of certain of the products of the appellant, with a minimum amount guaranteed. The sales representative agreed to pay his own expenses out of his remuneration. The agreement contemplated sales demonstrations being arranged and the possible employment of demonstrators and of junior salesmen. Each agreement provided that the sales representative would devote his entire time, best effort and full and undivided attention to the sale of the appellant's products in his territory, and the sales representative agreed to follow the appellant's instructions and expressed wishes in carrying out his work.

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Martland J.

The sales representatives did not have authority to make contracts on the appellant's behalf and did not keep in Quebec a supply of goods for delivery as a result of the sales which they made. Orders were filled from the appellant's plant in Ontario.

Comtois and Dyke each maintained an office in his own residence, but received no rent or added compensation from the appellant for so doing. Each provided his own office equipment, without compensation therefor from the appellant. The telephone directory did not list the sales representative's residence as the appellant's place of business and the residence did not carry any business signs. The appellant provided its sales representative with calling cards, showing that he was the appellant's representative.

The office of the sales representative was used by him for doing the paper work involved in his business. Some of the orders from distributors were obtained there. In addition, sales demonstrations were held there on occasions and demonstrators were trained there. For these purposes the evidence was that the sales representatives kept quantities of the appellant's products at their premises, ranging in value from some $4,000 to $11,000.

On this evidence I am not prepared to hold that the appellant had a "permanent establishment" in the Province of Quebec in the years in question. Interpreting those words, apart from the provisions of s. 411(1)(*a*) of the Regulations, my opinion is that the word "establishment" contemplates a fixed place of business of the corporation, a local habitation of its own. The word "permanent" means that the establishment is a stable one, and not of a temporary or tentative character.

I now turn to s. 411(1) of the Regulations which, although already cited, I will repeat here:

> (*a*) "permanent establishment" includes branches, mines, oil wells, farms, timber lands, factories, workshops, warehouses, offices, agencies, and other fixed places of business;

Counsel for the respondent contended that in this paragraph the word "includes" should be interpreted as meaning "means and includes". Counsel for the appellant argued

that the definition contained in this paragraph was an expansive one. Both of them cited the judgment of Lord Watson in *Dilworth v. The Commissioner of Stamps*[1].

I do not think it is necessary to determine this point, in view of the fact that I interpret this paragraph as defining various kinds of places of business. All of the words used in this subsection, other than "branches" and "agencies", can have reference only to some form of real property. The paragraph concludes with the words "and other fixed places of business". When all the words of this paragraph are read together, in my opinion they are defining those kinds of places of business which constitute a permanent establishment.

From the evidence it is clear that the appellant did not have any fixed place of business of its own. As a result of its contracts with Comtois and with Dyke, it had, and it only had, an employee, who was subject to dismissal on two weeks' notice, to act as its sales representative. I do not agree that the fact that such employee, for the discharge of his duties under his contract, set up an office in his own premises constituted that office a branch, an office or an agency of the appellant. It is the appellant who must have the permanent establishment in the Province of Quebec to qualify for the tax deduction and neither the office of Comtois nor that of Dyke was, in my opinion, a permanent establishment of the appellant.

The fact that the appellant had an employee or agent in Quebec was not, in itself, sufficient to constitute a permanent establishment of the appellant. This, I think, is made clear by para. (*b*) of s. 411(1) of the Regulations. An employee or agent can be deemed to operate a permanent establishment of a corporation under that paragraph, but only if he has authority to contract for his employer or principal, or if he has a stock of merchandise from which he regularly fills orders which he receives. Neither of these requirements was met in the present case.

Finally, the appellant urged that it had a permanent establishment in Quebec, by virtue of subs. (2) of s. 411 of the Regulations, because its sales representatives had "substantial machinery or equipment", varying in value from $4,000 to $11,000, on their premises, in the tax years in

[1] [1899] A.C. 99 at 105 and 106.

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SUNBEAM CORPN. (CANADA) LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

question, which they used for sales demonstrations. I agree with Cameron J. that, as used in this subsection, the adjective "substantial" is intended to mean substantial in size and that the subsection was intended only to apply to machinery and equipment such as is used by contractors or builders in the course of their operations.

In any event, I do not agree that the use made by the sales representatives of the appellant's products for sales demonstration purposes constituted that kind of "use" which is contemplated by the subsection. In my opinion, in order to come within the subsection, the machinery or equipment would have to be used by the taxpayer for the purpose for which it was created. The appliances of the appellant, in the hands of its sales representatives, were not being used for any such purpose, but were merely being displayed, or operated for the purpose of demonstrating what their use was.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Miller, Thomson, Hicks, Sedgewick, Lewis & Healy, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

1962

*May 11
Oct. 2

DAME DONALDA DESROSIERS (*Mise-en-Cause*) ..... APPELLANT;

AND

WENCESLAS E. PARADIS AND OTHERS (*Defendants*) ..... RESPONDENTS;

AND

DAME AURORE RAINVILLE AND OTHERS (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Wills—Interpretation—Usufruct—Substitution—Meaning of words "legal heirs"—Civil Code, arts. 443, 446, 864, 891, 900, 925, 929, 957.

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Judson JJ.

By clause 3 of his will made in 1918, the testator bequeathed to his widow the usufruct of all his property. By clause 4, it was stipulated that at the death of the widow or in the event of her remarriage, a sum of $1,000 together with all property passing to the testator by inheritance were to go to his legal heirs. By clause 5, it was stipulated that should the widow die childless and without having remarried, the property remaining after the execution of clause 4 was to be divided in equal shares between his legal heirs and the widow's legal heirs. The testator died in 1949 and was survived by his widow and their only child M. The latter died a few months later having appointed his wife, the present appellant, his universal legatee. The testator's wife died in 1957, childless and without having remarried. In her will she had appointed her brothers and sisters as universal residuary legatees.

In 1958, the legal heirs of the testator living at the time of the death of the widow instituted this action against the executors of the will of the widow, claiming the whole estate on the ground that the testator had, by clauses 4 and 5 of his will, created a substitution in their favour and which had opened at the death of the widow. The appellant was added to the action as a mise-en-cause and she alone defended the action. She claimed specifically that the will had created a usufruct and that title to the estate had passed to the testator's son at the death of the testator and to her at the death of the son.

The trial judge maintained the action and held that the will had created a substitution in favour of the testator's legal heirs living at the time of the death of the widow. The plaintiffs were declared to be entitled to the property described in clauses 4 and 5. The Court of Queen's Bench modified this judgment and held that "legal heirs" in clause 4 meant those living at the time of the testator's death (in this case, the son), and in clause 5 the "legal heirs" were those living at the time of the death of the widow. The Court held that clause 4 had created a usufruct in favour of the widow with title going to the son and that the appellant was entitled to that part of the estate. As to clause 5, the Court held that since the son had not survived his mother, he could not take under it whether a substitution or an usufruct had been created. The son's widow appealed to this Court and the plaintiffs cross-appealed.

Held: The appeal and the cross-appeal should be dismissed.

As to the property in clause 4, the testator's widow had received only the usufruct. By virtue of art. 864 of the *Civil Code*, the title passed to the testator's legal heirs at the time of his death, in this case his widow and his son. But, since the widow was only entitled to the usufruct, it was the son alone who took title which, at his death, passed to his wife, the appellant. In this case, there were double gifts taking effect simultaneously and without any lapse of time. (*Aubertin v. Cité de Montréal*, [1957] S.C.R. 643). The plaintiff's action could not be entertained as to that property.

As to the property in clause 5, it would appear that the testator's widow had more than an usufruct. Here there were two gifts firstly to the widow and secondly to the legal heirs of the testator and of the widow. These two gifts did not take effect simultaneously; they were successive and there was a lapse of time between their taking effect. A substitution *de residuo* was created in this case, and since the son died before its opening, he could not have acquired or passed any rights in that property to his wife. The plaintiffs were therefore entitled to it.

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The expression "legal heirs" used in clause 5 meant those alive at the time of the opening of the substitution which was at the time of the death of the testator's widow.

APPEAL and CROSS-APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], modifying a judgment of St-Germain J. Appeal and cross-appeal dismissed.

A. Mayrand, Q.C., and *M. Johnson*, for the appellant.

Georges Sylvestre, Q.C., for the respondents.

The judgment of the Court was delivered by

FAUTEUX J.:—Le 7 avril 1949, Clément Rondeau décédait, laissant comme survivants immédiats son épouse, Délia Gareau, et leur unique enfant, Maurice. Aux termes de son dernier testament fait le 28 avril 1918, quelque trente ans avant son décès et alors que Maurice avait deux ans, il disposa comme suit de ses biens:

3. Je donne et lègue à Dame Délia Gareau, mon épouse, l'usufruit et jouissance, jusqu'à son convol en d'autres noces de tous les biens meubles et immeubles que je délaisserai lors de mon décès et qui composeront ma succession, pour en jouir à compter du jour de mon décès, sans être tenue à donner caution, ni à faire emploi, ni à faire faire inventaire.

4. Au décès de mon épouse ou au cas de son convol en d'autres noces, une somme de mille piastres ($1,000.00) et tous les autres biens qui me seront échus par succession et dont il aura été fait un état détaillé et assermenté par madite épouse avant son entrée en jouissance, retourneront à mes héritiers légaux, sans qu'elle puisse y prétendre aucun droit.

5. Et alors dans le cas où mon épouse décéderait sans enfants et sans s'être remariée, ce qui restera des biens de ma succession après qu'il aura été retourné à mes héritiers légaux les biens qui me seront échus par succession en plus d'une somme de mille piastres, sera partagé en deux parts égales dont l'une retournera à mes héritiers légaux et l'autre aux héritiers légaux de mon épouse.

6. Au cas où elle convolerait en d'autres noces, elle n'aura que la jouissance, sa vie durant, de la moitié dudit résidu de mes biens, l'autre moitié devant être payée à mes héritiers légaux sans qu'elle puisse y prétendre aucun droit et au décès de madite future épouse la moitié dont elle aura eu la jouissance retournera à ses héritiers légaux, à l'exclusion de son époux.

Madite épouse n'aura aucun droit à la jouissance de cette moitié dans le cas où convolant en d'autres noces, il existerait un ou des enfants issus de notre mariage, lesquels enfants auront alors la jouissance et la propriété absolue de tous mes biens.

Le fils de Clément Rondeau, Maurice, décéda sans postérité en 1949, quelques mois à peine après la mort de son

[1] [1962] Que. Q.B. 27.

père. Il était alors marié à l'appelante, Donalda Desrosiers, qu'il avait, par contrat de mariage, instituée sa légataire universelle.

La veuve de Clément Rondeau, Délia Gareau, mourut en 1957 sans enfants et sans s'être remariée. Dans son dernier testament, elle désigna ses frères et sœurs comme ses légataires universels résiduaires.

L'année suivante, en 1958, les intimés, héritiers légaux de Clément Rondeau vivants au décès de son épouse, Délia Gareau, ou ayants droit d'iceux, étant d'avis que Clément Rondeau avait, aux paragraphes 4 et 5 de son testament, établi en leur faveur une substitution relativement aux biens y décrits et que cette substitution s'était ouverte au décès de Délia Gareau, instituèrent aux exécuteurs testamentaires de celle-ci, W. Paradis et al, une action en pétition d'hérédité pour se faire remettre chacun leur part de ces biens. Dans cette action, ils mirent en cause les autres héritiers légaux de Clément Rondeau vivants au décès de son épouse ou leurs ayants droit, ainsi que la veuve de Maurice Rondeau, l'appelante en cette cause. Seule, celle-ci contesta. Elle plaida particulièrement—et c'est là l'unique moyen à retenir à ce stade des procédures—que le testament de Clément Rondeau créait en faveur de son épouse, Délia Gareau, non pas une substitution mais un simple usufruit sur les biens laissés, la nue propriété de ces biens ayant été, au décès du testateur, transmise à son fils, Maurice Rondeau, et au décès de ce dernier, à elle-même, sa légataire universelle.

La Cour supérieure accueillit cette action pour le tout. Elle jugea que le testament créait une substitution en faveur des héritiers légaux de Clément Rondeau vivants au moment du décès de son épouse, Délia Gareau, et que cette substitution s'était ouverte au décès de celle-ci. En conséquence, la Cour ordonna aux exécuteurs testamentaires de remettre aux demandeurs chacun leur part des biens décrits tant au paragraphe 4 qu'au paragraphe 5 du testament.

Porté en appel[1] par la veuve de Maurice Rondeau, ce jugement fut modifié par une décision majoritaire aux seules fins d'écarter du dispositif les biens décrits au paragraphe 4 du testament. MM. les Juges Bissonnette, Rinfret et Choquette, de la majorité, exprimèrent l'avis que l'expres-

[1] [1962] Que. Q.B. 27.

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Fauteux J.

sion «mes héritiers légaux» utilisée pour désigner les bénéficiaires des dispositions du paragraphe 4 et ceux des dispositions du paragraphe 5 visaient, au paragraphe 4, les héritiers légaux de Clément Rondeau vivants au moment de son décès, et, au paragraphe 5, ses héritiers légaux vivants au moment du décès de son épouse. Donnant effet à cette interprétation, ils jugèrent d'abord que le testateur avait, au paragraphe 4, établi, en faveur de son épouse, un usufruit sur un legs à titre universel dévolu, à son décès, à ses propres héritiers légaux et qu'ayant manifestement exclu son épouse de ce legs, son fils Maurice lui survivant avait, dès la mort de son père, été saisi de la nue propriété de ces biens qu'il transmit lui-même, à son décès, à son épouse, Donalda Desrosiers. Référant ensuite au paragraphe 5, les Juges de la majorité inclinèrent à y voir une substitution relativement au résidu des biens mais ne jugèrent pas nécessaire de décider la question, car le fils Maurice, n'ayant pas survécu à l'épouse de Clément Rondeau demeurée veuve, ne pouvait, vu le sens attribué à l'expression «mes héritiers légaux» dans ce paragraphe, bénéficier de la disposition, qu'il s'agisse d'un usufruit (art. 901 C.C.) ou d'une substitution (art. 957 C.C.). Dissidents, MM. les Juges Owen et Montgomery auraient rejeté l'appel. D'accord avec leurs collègues, ils jugèrent comme eux que l'expression «mes héritiers légaux» au paragraphe 5 signifiait les héritiers légaux de Clément Rondeau existant au moment du décès de son épouse, mais contrairement aux juges de la majorité, ils considérèrent que la même expression au paragraphe 4 devait recevoir la même signification qu'au paragraphe 5 et qu'en conséquence, il y avait, comme en avait décidé le juge de première instance, une substitution dans les deux clauses.

De là un double pourvoi à cette Cour: appel de Donalda Desrosiers pour obtenir le complet rejet de l'action des intimés, et contre-appel de ces derniers pour faire rétablir le jugement de première instance tel que celui-ci fut modifié par un *retraxit* produit pour corriger une erreur qui s'était glissée dans le dispositif.

Il s'agit donc d'interpréter les dispositions testamentaires précitées. Nonobstant les imprécisions, ambiguïtés ou contradictions qu'on peut y relever, ces dispositions lorsque interprétées les unes par les autres en donnant à chacune le

sens qui résulte de leur ensemble, justifient, je crois, l'opinion exprimée par les juges de la majorité en Cour du banc de la reine sur la véritable intention du testateur.

Comme déjà indiqué, Clément Rondeau fit son dernier testament quelque trente ans avant son décès et alors que lui et sa femme avaient un enfant de deux ans. Anticipant que le corpus de sa succession serait composé de deux parties distinctes de biens, la première comprenant ceux qui lui seraient échus par succession et la seconde les autres biens qu'il laisserait à sa mort, il voulut faire une attribution différente de chacune de ces deux parties. De plus et à ces fins, il envisagea diverses éventualités dont celle où son épouse survivrait à lui-même et à leur commune postérité et demeurerait jusqu'à décès en état de viduité. Au regard de cette éventualité, qui de fait s'est produite, il disposa comme ci-après de ses biens.

Au paragraphe 3, il constitue ce qui *prima facie* est un legs d'usufruit ayant pour objet tous les biens du corpus. Toutefois les termes de cette disposition générale sont par la suite contrôlés par ceux des dispositions spéciales apparaissant aux paragraphes 4 et 5 visant spécifiquement la première et la seconde partie des biens respectivement.

Relativement aux biens qui lui seraient échus par succession, et une somme de mille dollars, il ne lègue à son épouse, Délia Gareau, qu'un droit d'usufruit sa vie durant. Ceci appert clairement des dispositions du paragraphe 3 et du paragraphe 4 particulièrement, en lequel il prescrit qu'avant d'entrer en jouissance de cette première partie des biens, elle devra en faire un état détaillé et assermenté, et spécifie qu'au décès de son épouse ou à son convol en d'autres noces, ces biens retourneront à ses héritiers légaux à lui, sans que celle-ci ne puisse y prétendre aucun droit. On retrouve, en plus, la confirmation de cette constitution d'usufruit aux dispositions du paragraphe 6. La veuve de Clément Rondeau n'a donc aucun droit à la nue propriété de cette partie des biens. Ce droit, qui durant la durée problématique de cet usufruit ne peut rester en suspens, serait, en l'espèce, au silence du testament, transmissible *ab intestat* aux héritiers légaux du testateur au moment de son décès, soit son épouse et son fils. (Art. 864 C.C.). Celle-ci ne pouvant cependant prétendre à d'autres droits que l'usufruit, seul le fils Maurice hérita du droit à la nue propriété qu'il transmit

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lui-même, lors de son décès, à l'appelante, sa légataire universelle. Il y a donc eu, quant à cette partie des biens, deux libéralités, l'une d'usufruit et l'autre de nue propriété, bénéficiant respectivement à la veuve et au fils du testateur, toutes deux prenant effet simultanément dès le décès de ce dernier. Il n'y a pas *d'ordre successif* ou le trait du temps entre ces deux libéralités, contrairement à ce qui est la situation dans le cas de la substitution fidéicommissaire où un bénéficiaire gratifié en premier ordre doit, à un terme donné, rendre, en partie ou en totalité, ce qu'il a reçu à un bénéficiaire gratifié en second ordre. Cette distinction entre l'essence de la constitution d'usufruit et celle de la substitution fidéicommissaire est clairement exposée par notre collègue M. le Juge Taschereau dans *Aubertin v. La Cité de Montréal*[1]. Il en résulte que l'action des intimés quant à cette partie des biens ne peut être reçue.

Quant à la seconde partie des biens, le testateur a bien, comme pour la première partie, utilisé, dans la disposition générale du paragraphe 3, le mot «usufruit» pour désigner le legs bénéficiant à son épouse. Il apparaît cependant, au même paragraphe, que relativement à cette seconde partie des biens, contrairement à ce qui est le cas pour la première partie, sa veuve n'est pas tenue de faire inventaire. De plus, le testateur exprime clairement au paragraphe 5 la volonté que «*ce qui restera*» de cette partie des biens au décès de son épouse sera alors partagé en deux parts égales dont l'une retournera à ses héritiers légaux à lui et l'autre aux héritiers légaux de son épouse. Comme l'indique l'art. 928 C.C., une substitution peut exister quoique le terme d'usufruit a été employé pour exprimer le droit du grevé, et c'est d'après l'ensemble de l'acte et l'intention qui s'y trouve suffisamment manifestée plutôt que d'après l'acceptation ordinaire de certaines expressions qu'il est décidé s'il y a ou non substitution. Les dispositions du paragraphe 5 n'ont pas pour objet la totalité des biens formant cette seconde partie du corpus, telle qu'existant au moment du décès de Clément Rondeau, mais simplement «*ce qui restera*» de cette partie des biens au décès de sa veuve et la façon dont il devra alors en être disposé. Il semble bien que Clément Rondeau ait, quant à cette seconde partie des biens, donné à son épouse plus qu'un simple usufruit, qu'il lui ait accordé en plus le

[1] [1957] S.C.R. 643 at 647.

droit d'en faire certaines aliénations. Comme le signale Migneault, Droit Civil Canadien, vol. 5, au bas de la page 88, en s'appuyant sur Thévenot d'Essaule, le fidéicommis *de residuo* s'énonce ordinairement par la formule: Vous rendrez à un tel, lors de votre décès, *ce qui restera* de mes biens. Plus loin, à la page 93, traitant de la variété des effets de la substitution dépendant de la variété des termes la constituant, Migneault dit: «S'il s'agit d'un véritable fidéicommis *de residuo, c'est-à-dire de l'obligation imposée au grevé de rendre à l'appelé ce qui restera des biens* .....". Voir aussi Pothier, édition Bugnet, vol. 8, Traité des Substitutions, n° 140, p. 502 et n° 149, p. 504. Ainsi donc, quant à cette seconde partie des biens, il y a deux libéralités bénéficiant, en premier ordre, à la veuve et, en second ordre, aux héritiers légaux du *de cujus* et héritiers légaux de son épouse, chaque ligne pour une moitié. Ces deux libéralités ne prennent pas effet simultanément; il y a un ordre successif ou le trait du temps entre chacune. Si donc, comme je le crois, après avoir considéré attentivement tous les moyens soulevés par le savant procureur de l'appelante, il s'agit ici d'une substitution *de residuo,* Maurice Rondeau, époux de l'appelante, étant décédé avant l'ouverture de la substitution, n'a acquis et n'a pu conséquemment transmettre aucun droit à l'appelante quant à cette partie des biens. Ce sont les intimés qui ont droit d'en recueillir chacun leur part. De plus, je partage l'opinion, exprimée en Cour d'Appel, qu'au paragraphe 5 le testateur s'est préoccupé de la dévolution des biens y mentionnés telle qu'elle devait se faire, non pas au moment de son décès, mais à celui de son épouse, et que l'expression «mes héritiers légaux» se réfère à ses héritiers légaux qui seraient alors vivants.

Je renverrais l'appel et le contre-appel avec dépens.

Appeal and cross-appeal dismissed with costs.

Attorneys for the appellant: Corbeil & Johnson, Montreal.

Attorney for the respondents: G. Sylvestre, Joliette.

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*Dec. 10
Dec. 17

FONG SING .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Acquittal—Court of Appeal ordering extension of time for applying for stated case—Stated case remitted for hearing and disposal on its merits—Supreme Court without jurisdiction to grant leave to appeal.

The applicant was acquitted on two charges of evading payment of income tax on the sole ground that the proceedings against him, having been instituted more than six months after the time when the subject-matter of the proceedings arose, were barred by the provisions of s. 693 (2) of the *Criminal Code*, despite the provisions of s. 80(4) of the *Income War Tax Act*, R.S.C. 1927, c. 97, as amended by 11-12 Geo. VI, c. 53, s. 13. The Crown's application for a stated case was made six days after the acquittal was granted instead of within four days as required by Rule 13 of the *Crown Office Rules (Criminal)*. When the stated case came on for hearing before Lord J., an application was made on behalf of the Crown to extend the time for applying for the said stated case, which application was refused and the appeal by way of stated case dismissed on the ground that the case was not stated within the time prescribed. Upon appeal to the Court of Appeal the matter was referred back to the Supreme Court for reconsideration.

The application that the time for applying for the stated case be extended was subsequently dismissed by Wilson J. The Court of Appeal allowed an appeal from the latter decision and ordered that the time for applying for the stated case be extended and that the stated case be remitted to the Supreme Court for hearing and disposal. From this judgment the applicant applied for leave to appeal to this Court.

Held: The application should be dismissed.

The power conferred on this Court by s. 41 of the *Supreme Court Act* to grant leave to appeal from judgments relating to offences other than indictable offences is limited to cases in which the judgment sought to be appealed is that of a court acquitting or convicting an accused or setting aside or affirming a conviction or acquittal. The judgment of the Court of Appeal in the present case did none of these things. For the time being the acquittal of the applicant remained standing; the effect of the judgment of the Court of Appeal was not to set it aside but to require a judge of the Supreme Court of British Columbia to hear and dispose of the stated case on its merits and therefore to decide whether the acquittal should be set aside or affirmed. *Paul v. The Queen*, [1960] S.C.R. 452, followed.

APPLICATION for leave to appeal from a judgment of the Court of Appeal for British Columbia. Application dismissed.

W. J. Wallace, for the applicant.

D. Walker, for the respondent.

*PRESENT: Cartwright, Martland and Ritchie JJ.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an application for leave to appeal to this Court from a judgment of the Court of Appeal for British Columbia pronounced on May 1, 1962, and entered on October 3, 1962.

On August 11, 1960, the applicant was acquitted by a deputy police magistrate in and for the City of Vancouver on two charges of evading payment of income tax. The sole ground of acquittal was that the proceedings against the applicant, having been instituted more than six months after the time when the subject-matter of the proceedings arose, were barred by the provisions of s. 693(2) of the *Criminal Code,* despite the provisions of s. 80(4) of the *Income War Tax Act,* R.S.C. 1927, c. 97 as amended by 11-12 George VI, c. 53, s. 13, which provided:

> (4) An information or complaint under Part XV of the *Criminal Code* in respect of an offence under this section or section forty-six A may be laid or made within five years from the time when the matter of the information or complaint arose or within one year from the day on which evidence, sufficient in the opinion of the Minister to justify a prosecution for the offence, came to his knowledge, and the Minister's certificate as to the day on which such evidence came to his knowledge is conclusive evidence thereof.

On August 17, 1960, an application was made on behalf of the Attorney General for Canada to the learned deputy magistrate to state a case pursuant to s. 734 of the *Criminal Code.*

At that date the procedure to be followed was governed by the *Crown Office Rules (Criminal)* of the Province of British Columbia, Rule 13 of which read:

> 13. Every application by a party aggrieved to a Justice to state a case shall be made within four days after the order, determination, or other proceeding has been made or rendered, or within such further time as may be allowed by the Court or a Judge.

On September 9, 1960, a case was stated by the learned deputy police magistrate and notice dated September 16, 1960, that a case had been stated and was to be heard in the Supreme Court of British Columbia on November 1, 1960, was served on the applicant.

On November 1, 1960, the hearing of the stated case was adjourned by the presiding judge in chambers pending the

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result of the appeal to the Supreme Court of Canada, taken from the judgment of the Appellate Division of the Supreme Court of Alberta in *The Queen v. Machacek*[1]. By judgment of this Court pronounced on January 24, 1961, the appeal in *Machacek's* case was allowed. This judgment is reported in [1961] S.C.R. 163.

The stated case came on for hearing before Lord J. on February 21, 1961, at which time an application was made on behalf of the Attorney General, pursuant to Rule 13, *supra,* to extend the time for applying for the said stated case, which application was refused and the appeal by way of stated case dismissed on the ground that the case was not stated within the time prescribed.

By notice, dated March 1, 1961, an appeal was entered in the Court of Appeal for British Columbia from the judgment of Lord J. and by judgment of the Court of Appeal[2] pronounced on June 12, 1961, the appeal was allowed and it was ordered that the stated case be remitted back to the Supreme Court to consider whether the time for applying for the stated case should be extended and if so to hear the said stated case.

The application that the time for applying for the stated case be extended to August 17, 1960, came on for hearing before Wilson J. on September 13, 1961, and that learned judge dismissed the application, giving the following oral reasons:

> If it (the hearing of the stated case herein) had gone on then (the 1st day of November, 1960) he would have been not guilty. If the matter had come on before me, I would not have granted an adjournment, not in a criminal case. I am going to refuse the application.

The formal order of Wilson J. reads as follows:

> UPON THE APPLICATION of the appellant by the Attorney General of Canada, in the presence of J. S. Maguire, Esq., Q.C. of counsel for the appellant, and W. J. Wallace, Esq. of counsel for the respondent; AND UPON HEARING counsel aforesaid;
>
> IT IS ORDERED that the application be and the same is hereby dismissed.

It is clear that Wilson J. dealt with the question whether the extension of time should be granted and having decided that it should not he did not deal with the stated case on its merits.

[1] (1960) 32 W.W.R. 73, 33 C.R. 283, 127 C.C.C. 418; reversed, [1961] S.C.R. 163, 34 C.R. 299, 129 C.C.C. 1.

[2] (1961), 35 W.W.R. 525, 35 C.R. 406, 131 C.C.C. 72.

Notice of motion for leave to appeal to the Court of Appeal from the judgment of Wilson J. was filed and served on September 27, 1961. On May 1, 1962, the Court of Appeal granted leave to appeal, allowed the appeal and ordered:

> That the time for applying for the Stated Case herein be and the same is hereby extended to and including the 17th day of August, A.D. 1960; and that the Stated Case be remitted to the Supreme Court of British Columbia for hearing of the Stated Case herein, and disposal of it according to law.

It is from this judgment of the Court of Appeal that the applicant now asks leave to appeal on a number of grounds including the following:

> The Court of Appeal in hearing the appeal brought by the present plaintiff (respondent) from the decision of the Honourable Mr. Justice Wilson exceeded its jurisdiction under Section 743(1) in that the question whether the learned Judge properly exercised his discretion in refusing to extend the time for stating a case is not a question of law alone.

No reference to the question of its jurisdiction is made in the reasons for judgment given orally by the Court of Appeal.

The application to this Court is met *in limine* by the objection that we are without jurisdiction. To this it is answered that jurisdiction is conferred by s. 41 of the *Supreme Court Act*.

The reasons of the majority of this Court in *Paul v. The Queen*[1] appear to me to hold that on the true construction of s. 41 the power thereby conferred on this Court to grant leave to appeal from judgments relating to offences other than indictable offences is limited to cases in which the judgment sought to be appealed is that of a court acquitting or convicting an accused or setting aside or affirming a conviction or acquittal. The judgment of the Court of Appeal of May 1, 1962, does none of these things. For the time being the acquittal of the applicant stands; the effect of the judgment of the Court of Appeal is not to set it aside but to require a judge of the Supreme Court of British Columbia to hear and dispose of the stated case on its merits and thereby to decide whether the acquittal shall be

[1] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.

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set aside or affirmed. In these circumstances it is my opinion that we are bound by the judgment in *Paul v. The Queen*, *supra*, to hold that we are without jurisdiction to grant the leave sought by the applicant.

For these reasons I would dismiss this application.

Application dismissed.

Solicitors for the applicant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitors for the respondent: Clark, Wilson, White, Clark & Maguire, Vancouver.

1963 A.C.R. 481

1961
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June 25

STANDISH HALL HOTEL INCORPORATED (*Suppliant*) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Petition of Right—Crown—Compensation—Subsequent partial abandonment and revesting—Loss of profits in intervening period—Method of valuation—Expropriation Act, R.S.C. 1952, c. 106, ss. 9, 24(1), (4).

In 1952, the suppliant's property, which included a hotel, was expropriated by the Crown in right of Canada under the authority of the *Expropriation Act*, R.S.C. 1927, c. 64. Some months before, the hotel had been seriously damaged by fire and temporarily repaired. The Crown held title for some 22 months and then, by appropriate notice under s. 24 of the *Expropriation Act*, R.S.C. 1952, c. 106, abandoned most of the property, including the hotel, which revested in the suppliant. The latter remained in possession after the expropriation and continued to carry on its business without paying rent. Permanent reconstruction of the building, for which plans had been prepared, was not proceeded with until after the notice of abandonment.

In 1956, by its petition of right, the suppliant made a claim for damages incurred as a result of the expropriation and as compensation for the land taken and not revested. The trial judge awarded $28,600 for loss of profits for the 22 months; $3,500 representing the architect's fees for the preparation of plans for additions to the hotel, proposed prior to the expropriation; $6,021 (plus ten per cent for compulsory taking) for the value of the land retained; and $1,500 for injurious affection resulting from the loss of a right-of-way. In addition, he ordered that

PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

certain valuation and legal fees be determined on taxation by the registrar. The suppliant appealed to this Court and the Crown moved to vary the judgment.

Held: The appeal should be dismissed and the motion to vary allowed in part. Kerwin C.J. and Locke J. (dissenting in part) would not have allowed anything for compensation for the expropriation in view of its subsequent withdrawal.

Per Curiam: The amount of $6,021 for the land retained (but, in view of *Drew v. The Queen,* [1961] S.C.R. 614, without the ten per cent allowance for compulsory taking) and the amount of $1,500 for the deprivation of the right-of-way should not be altered. There was no reason to interfere with the disposition of the valuation and legal fees as made by the trial judge.

Per Taschereau, Fauteux and Abbott JJ: The fact that the whole or part of the expropriated land was returned to the owner did not change the nature of the owner's claim for compensation; it remained a claim under s. 23 of the *Expropriation Act* against the compensation which stands in the stead of the land, and under s. 24 of the Act the revesting was to be taken into account in assessing the amount to be paid. Hence, the value of the land as of the date of expropriation must be set against the value of the land revested as of the date of the revestment. In the circumstances of this case, there should be added to the fair market value of the property expropriated an allowance for business disturbance, in this case of $25,000. Had it not been for the revesting this allowance might have been higher. This allowance should be added to the market value of the property at the date of expropriation. Then from the total arrived at should be deducted the fair market value of the land retained. By that process, the suppliant was entitled to received $30,501.

Per Kerwin C.J., *dissenting in part:* Since the suppliant never attempted to move its business there was no basis for giving anything for loss of business. In addition to the $6,021 for the value of the land retained by the Crown and the $1,500 for the deprivation of the right-of-way, the suppliant was entitled as a separate item to the sum of $3,500 for drawing plans, etc.

Per Locke J., *dissenting in part:* The loss of possible profits amounting to $28,600 awarded by the trial judge could not be allowed as a deduction from the value of the property at the date of the abandonment. The suppliant was entitled under s. 24(4) of the Act to be compensated for such loss as was shown to have been sustained by it which was attributable to the fact that it was deprived of title to the property for a period of 22 months. If there was any loss of profits during that period the suppliant had no claim for compensation, since such loss was occasioned by its voluntary act in remaining in possession rent free. If there was any legal basis for such a claim, the evidence did not support any award. Furthermore, the sum of $3,500 allowed by the trial judge as the fees of the architect should not have been awarded. The suppliant could have availed itself of the benefit of these plans after the notice of abandonment had it wished to do so, and suffered no loss attributable to the expropriation.

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APPEAL by the suppliant from and motion to vary a judgment of Kearney J. of the Exchequer Court of Canada[1], awarding compensation in a matter of expropriation. Appeal dismissed and motion to vary allowed in part (Kerwin C.J. and Locke J. dissenting in part).

J. G. Ahern, Q.C., and *H. J. Maloney, Q.C.*, for the suppliant, appellant.

P. M. Ollivier, for the respondent.

THE CHIEF JUSTICE (*dissenting in part*):—This is an appeal by Standish Hall Hotel Incorporated from a judgment of the Exchequer Court[1], dated March 15, 1960, in proceedings commenced therein by the appellant by petition of right. The respondent gave a notice to vary the judgment.

It is important to set forth the substance of the formal judgment:

(*a*) It ordered that $6,623 with interest from July 19, 1952, to the date of judgment was sufficient and just compensation for the taking by the respondent of part of Lot 304 in Ward II, District of Hull, Quebec, containing 2,007 sq. ft., and for any loss occasioned to the owner or any other person having interest in the land on July 19, 1952, "the said sum of Six Thousand Six Hundred and Twenty-Three Dollars ($6,623) to include the allowance for forceable taking";

(*b*) That the appellant recover from the respondent $31,600 with interest from May 18, 1954, to the date of judgment "as compensation for the expropriation and subsequent revesting of the lands described as parts of Lot 304, 306 and 307 in Ward II, District of Hull, Quebec, having a total area of Eighty-six Thousand Five Hundred and Thirty-six Square Feet (86,536 sq. ft.) less the Two Thousand and Seven Square Feet (2,007 sq ft.) aforesaid";

(*c*) It ordered "that the sum of One Thousand Five Hundred Dollars ($1,500) with interest from the 19th day of July, A.D. 1952 to the date hereof is a sufficient and just allowance for injurious affection for the deprivation of a registered servitude consisting of a right of passage over lands adjoining the said lands hereinbefore referred to";

(*d*) It ordered that the appellant recover such further amounts "in respect of assessors and legal fees as may be determined on taxation by the Registrar";

(*e*) It ordered that the respondent pay the appellant the costs of the action.

On July 19, 1952, the appellant was the owner of lands in Hull, in the Province of Quebec, upon which was erected the Standish Hall Hotel. On that date this property was

[1] [1960] Ex. C.R. 373, 23 D.L.R. (2d) 38.

expropriated by the respondent under the provisions of the *Expropriation Act*, R.S.C. 1927, c. 64. On May 18, 1954, the respondent abandoned the expropriation of this land except a small part at the south-eastern extremity, which is the part described in (*a*) of the summary of judgment set forth above. In the meantime, on July 14, 1953, the respondent had filed an information to have the amount of compensation determined under the expropriation of July 19, 1952, but no further proceedings have been taken. At the hearing of the present action it was agreed by counsel that the information by the respondent should be dismissed without costs but it was also agreed that the account of the late Senator Beauregard for legal services against the appellant and also the amount paid to the expert (W. E. Noffke) in connection with the first expropriation "should not be prejudiced". The Court thereupon directed that "this expense will be attached to the petition of right". Subject to this the information by the respondent need not be further considered.

The account of Senator Beauregard was referred to the registrar for taxation and the trial judge considered the claim of W. E. Noffke of $11,800, allowed it at $3,500, but, after some hesitation, placed it in the same category as, (and therefore included it in), the allowance of $31,600 he granted as "Loss of business caused by the expropriation". Counsel for the appellant argued that Noffke's account should have been fixed at $4,400 but subject to that is satisfied with the amount fixed by the trial judge under heading (*b*), although claiming other amounts in connection with other items which were disallowed. On the other hand, the respondent takes the position that if the petition of right is maintained and the appellant awarded compensation, the appellant is entitled to assessor's fees as part of the costs of the cause and to the amount allowed for Noffke's account.

As to the small bit of land referred to in (*a*) above, we are all of opinion that no reason has been shown to alter the value placed upon it by the trial judge, $6,021. However, in view of the decision of this Court in *Drew v. Her Majesty the Queen*[1], ten per cent of that sum which the trial judge allowed for forceable taking cannot stand. This item is

[1] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.

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therefore reduced to $6,021. Similarly we are all of opinion that the value of the servitude referred to in (*c*) should not be increased from the $1,500 allowed by the trial judge. The "assessors and legal fees" in (*d*) refer to the account of Senator Beauregard and to whatever may be properly allowable to Noffke as a witness at the trial. It does not include anything for Noffke's account of $11,800 for preparing plans after the expropriation because while the trial judge in his reasons shows that he considered that it should be fixed at $3,500, he did not allow it specifically, as he had included the $3,500 in the sum of $31,600 mentioned in (*b*). I would not interfere with the trial judge's disposition of the fees of assessors (which include Noffke's) and of Senator Beauregard's account, but, as I consider no allowance should be made for what I understand the trial judge has fixed as damages, I would allow the $3,500 as a separate item.

The appellant did not move its hotel business to another site and therefore I am unable to concur with the trial judge that anything is allowable "in equity". The appellant remained in possession of the hotel property and carried on business, paying no rent, and according to the exhibits filed at the trial as to which there was no cross-examination, paying taxes and insurance premiums. The trial judge fixed the value of the lands as of the date of expropriation and the value as of the date of abandonment, finding the latter to be slightly in excess of the former. There is no basis for giving the appellant anything for loss of business as it never attempted to move its business.

I would therefore dismiss the appeal with costs, allow the motion to vary with costs and in lieu of the judgment below direct that it read as follows:

1. That it be ordered and adjudged that $6,021 with interest from July 19, 1952, to the date of judgment, March 15, 1960, was sufficient and just compensation for the taking by the respondent of part of lot 304 in ward II, District of Hull, Quebec, containing 2,007 sq. ft., and for any loss occasioned to the owner or any other person having interest in the land on July 19, 1952.

2. That the sum of One Thousand Five Hundred Dollars ($1,500) with interest from the 19th day of July, A.D. 1952 to March 15, 1960, is a sufficient and just allowance for

injurious affection for the deprivation of a registered servitude consisting of a right of passage over lands adjoining the lands expropriated.

3. That the appellant recover such further amounts in respect of assessors and legal fees as may be determined on taxation by the registrar.

4. That the appellant recover the sum of $3,500 for the services of W. E. Noffke for drawing plans, etc.

5. That the respondent pay the appellant the costs of the action.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—The appellant has appealed, and the Crown has moved to vary, a judgment of the Exchequer Court[1], rendered on March 15, 1960, awarding to appellant the sum of $39,723 as compensation for its property and in addition certain valuation and legal fees to be determined on taxation by the registrar.

The facts are fully set forth in the judgment of the learned trial judge and for the purposes of this appeal can be shortly stated.

The appellant is the owner and operator of the Standish Hall Hotel which is situated close to the centre of the main business section of Hull. It has frontage on three important streets, namely 293.8′ on rue Principale to the south, 190.5′ on rue Montcalm to the west and 184.4′ on Wellington St. to the north. The eastern boundary, being part of lot 304, measures 351′. The total area of the land is approximately 84,700 sq. ft.

On July 19, 1952, the above property along with other property to the east of it was expropriated by Her Majesty the Queen under the authority of the former *Expropriation Act*, R.S.C. 1927, c. 64.

On May 18, 1954, twenty-two months later, the Crown abandoned the expropriation of the appellant's property with the exception of a small area of vacant land measuring approximately 2007 sq. ft. and situated at the southeastern extremity of the land.

[1] [1960] Ex. C.R. 373, 23 D.L.R. (2d) 38.

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Appellant remained in possession of the property during the full period of expropriation, continued to carry on its business there and paid no rent. Some months before the notice of expropriation was given on July 19, 1952, the buildings on the property had been seriously damaged by fire and temporary repairs were made prior to that date. Permanent reconstruction of the buildings, for which plans had been prepared, was not proceeded with however, until after the notice of abandonment was given by the Crown on May 18, 1954.

On January 7, 1956, appellant took a petition of right against the Crown claiming $584,330.61 as damages incurred as a result of the expropriation and as compensation for the land taken and not revested.

Both the appeal and the motion to vary turn upon the interpretation and effect to be given to ss. 23 and 24 of the *Expropriation Act*, R.S.C. 1952, c. 106, which read:

23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in Her Majesty.

24. (1) Whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the Minister may, by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown, or that it is intended to retain only such limited estate or interest as is mentioned in such writing.

(2) Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate, such land declared to be abandoned shall revest in the person from whom it was taken or in those entitled to claim under him.

(3) In the event of a limited estate or interest therein being retained by the Crown, the land shall so revest subject to the estate or interest so retained.

(4) The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

The meaning and effect of these two sections was considered by this Court and by the Judicial Committee in *Gibb v. The King*[1], and Fitzpatrick C.J. (whose judgment was declared to be correct in all respects by the Judicial Committee) at p. 407 said:

> The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates.
>
> The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sc. 47 of the "Exchequer Court Act" and also to the decision of the Judicial Committee of the Privy Council in the *Cedar Rapids Manufacturing and Power Co. v. Lacoste* (1914) A.C. 569, to the effect that the compensation to be paid for land expropriated is the value to the owner as it existed at the date of the taking. If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.

The fact that the whole or some portion of the land expropriated has been returned to the person from whom it was taken, does not change the nature of the owner's claim for compensation. It remains a claim under s. 23 of the *Expropriation Act* against the compensation money which stands in the stead of the land. As Lord Buckmaster said in *Gibb v. The King, supra,* at p. 922:

> Even after revesting, the claim for compensation still remains open for adjustment, for it has nowhere been taken away or satisfied, and in its settlement the effect of the revesting is an element to be considered.
>
> Their Lordships are therefore unable to accept the view that the true measure of the appellant's right is something in the nature of a claim for damages for disturbing or injuriously affecting. In fact, so far as the particular piece of land is concerned, the Crown does not appear to have done any act upon the land itself that would either damage or injuriously affect its value. Its advisers have been enabled by virtue of the section to change their mind and give back the property which they originally took, and it is this fact which must be considered with other circumstances in determining the original amount of compensation which they became liable to pay.

It follows that in a case such as this the tribunal of fact must first determine in accordance with well-established principles, the value of the land to the owner as of the date of the expropriation and the value of the land revested must also be determined as at the date of revestment. If the latter value is equal to or exceeds the value of what was taken, the owner is then in the position of having received in property

[1] (1915), 52 S.C.R. 402, 27 D.L.R. 262; [1918] A.C. 915, 42 D.L.R. 336.

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"the equivalent in value to him of the property taken as of the date when sec. 23 became operative" to adopt the words used by Duff J. in *Gibb v. The King, supra,* at p. 429.

The learned trial judge found the fair market value of the property at the date of expropriation to have been $440,743, and some twenty-two months later at the date of revesting to have been $441,263. There is ample evidence to support those findings and they should be accepted.

To each of these amounts however, he added $100,000 as "a value in equity" to appellant of the business conducted on the property. He therefore fixed the value of the property to appellant as owner, at the date of expropriation, at $540,743.

As I have stated, at the date of revesting he found the market value of the property to be $441,263 (an increase of $520) to which he added the sum $100,000 just referred to. From that total of $541,263 he deducted $28,600 for loss of profits during the twenty-two month period and $3,500 for the cost of certain plans prepared for appellant but not used, and fixed the value to the owner at the date of revesting at $509,163.

The effect of these calculations was of course to award to appellant a sum of $28,600 as damages for loss of profits and a sum of $3,500 representing the cost of certain plans.

In the result the learned trial judge held that appellant was "entitled to succeed to the extent of $31,600 being the depreciation in value to the owner which the instant property suffered in the twenty-two month period during which the respondent retained title to it". To this sum he added (1) $6,623 (which included 10 per cent for forcible taking) as the value of the small portion of land retained by the Crown, (2) $1,500 for injurious affection due to loss of a right of way, and fixed the total compensation due by respondent at $39,723.

With deference, I am unable to agree that the compensation to which appellant may be entitled can properly be ascertained in this way.

The principles applicable in determining compensation are well established, and were re-stated by this Court in *Woods Manufacturing Co. v. The King*[1]. The rule is that the owner at the moment of expropriation is deemed as

[1] [1951] S.C.R. 504, 67 C.R.T.C. 87, 2 D.L.R. 465.

without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

In the *Woods* case, in *Diggon-Hibben Ltd. v. The King*[1], and in other cases decided by this Court, it has been held that in appropriate circumstances value to the owner includes an allowance for business disturbance. Appellant was without title to the property for some twenty-two months although it continued in possession, apparently with the consent of the Crown. In these circumstances, I think that an allowance for business disturbance should be made in fixing the compensation to which appellant was entitled but, under the terms of s. 24(4) of the *Expropriation Act*, the tribunal of fact in fixing the amount of such allowance must take into account the re-vesting and the fact that appellant continued to carry on business on the property.

As my brother Locke pointed out in *Drew v. The Queen*[2], such an allowance is in the nature of unliquidated damages and, except in very rare circumstances, cannot be determined with complete accuracy. In all the circumstances here, in my opinion an allowance of $25,000 for business dislocation is fully adequate and the value of the property to appellant as owner at the date of expropriation could not exceed its fair market value plus the amount of such an allowance. In my view, had it not been for the revesting such an allowance for business disturbance might well have been substantially higher than $25,000. The learned trial judge found the market value of the property at the date of expropriation to be $440,743. I would therefore fix the value to appellant as owner at that date at $465,743.

To arrive at the compensation to which appellant is entitled, from the said amount of $465,743 must be deducted the value of the land revested in appellant and for that purpose, in my opinion, the value of such land should be its fair market value at the date of revesting.

As I have stated, the learned trial judge found the market value of the whole property at the date of revesting to have been $441,263. He fixed the market value of the small portion retained by the Crown at $6,021, and in view of the

[1] [1949] S.C.R. 712, 4 D.L.R. 785.
[2] [1961] S.C.R. 614 at 626, 29 D.L.R. (2d) 114.

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decision in *Drew v. The Queen, supra,* there should be no allowance for compulsory taking. Deducting the said amount of $6,021 from the fair market value of the whole property at the date of revesting leaves a sum of $435,242 which represented the value of the property revested in the appellant. On May 18, 1954, the date of revesting, the appellant was entitled therefore to receive from respondent the sum of $30,501. Appellant should also receive the sum of $1,500 for injurious affection resulting from loss of a right-of-way as found by the trial judge. In the result, appellant is entitled to receive as compensation the sum of $32,001, with interest as from July 19, 1952, on the above amounts of $6,021 and $1,500, and as from May 18, 1954, on the balance.

The learned trial judge held that certain claims made by appellant for valuation and legal fees incurred in connection with the expropriation, should be referred to the registrar for assessment and taxation, and I see no reason for interfering with that disposition of these two claims.

I would dismiss the appeal with costs and allow in part the motion to vary with costs. The judgment is amended by striking out the words and figures "Six Thousand, Six Hundred and Twenty-three Dollars ($6,623)" wherever they appear in the first operative clause of the judgment and inserting in lieu thereof the words and figures "Six Thousand and Twenty-one Dollars ($6,021)". The judgment is also amended by striking out the words and figures in the second operative clause "Thirty-one Thousand, Six Hundred Dollars ($31,600)" and inserting in lieu thereof "Twenty-four Thousand, Four Hundred and Eighty Dollars ($24,480)".

LOCKE J. (*dissenting in part*):—This is an appeal by the suppliant, and a cross-appeal on behalf of the Crown, from a judgment[1] of Kearney J. awarding compensation to the appellant by reason of the expropriation by the Crown of a hotel property in the city of Hull. The expropriation was subsequently abandoned under the provisions of s. 24(1) of the *Expropriation Act,* R.S.C. 1952, c. 106. By the judgment appealed from, the appellant was awarded sums aggregating $39,723 and such further amounts as might be determined

[1] [1960] Ex. C.R. 373, 23 D.L.R. (2d) 38.

on taxation by the registrar for the services of an expert witness and for legal fees incurred in the circumstances to be hereafter mentioned.

The appellant is the owner of lands in the city of Hull upon which the Standish Hall hotel is built, which is and was at the relevant times operated as such. These operations were shown to have been profitable in five of the six years prior to August 1951 when a large area of the southern part of the hotel was damaged by fire. Repairs were made in that year which permitted the continuation of the business and the retention of the liquor licence, shown to be a valuable asset.

The notice of expropriation was given on July 19, 1952, and the notice of abandonment on May 18, 1954. The abandonment was not of the entire property, there being excepted a small area of vacant land containing 2,007 square feet situated along the south eastern limit of the land, and the value of this property is one of the matters in issue. The Crown permitted the appellant to remain in possession and to operate its business throughout this period without payment of any rent.

An information for the purpose of determining the compensation to be paid was exhibited by the Attorney General in the Exchequer Court on July 14, 1953, but it does not appear that this was served and, for reasons unexplained, the matter was not proceeded with by the Crown.

On July 5, 1956, the appellant filed a petition of right claiming a sum of $584,330.61 as compensation for damages claimed to have been suffered. The particulars of this claim were as follows:

1. For loss of good will and patronage due to inability to rebuild: ..... $160,000.
2. For loss of revenue for 22 months at $1,841.55 a month: 40,514.61
3. For loss of additional revenue from additions to the hotel, said to have been proposed prior to the expropriation during the 22 months' interval: ..... 220,140.
4. For the cost of temporary repairs to the premises: ..... 24,000.
5. For architect's fees for the plans of the proposed addition mentioned in No. 3 above: ..... 11,800.
6. For additional cost of the construction of an addition built in 1955 over 1952 prices: ..... 26,250.
7. For costs involved in expropriation proceedings: ..... 29,500. being $7,000. legal fees and "owner's expropriation expert's fee" W. E. Noffke $22,500.

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8. For value of 2,007 square feet retained: ..... 36,126.
9. For loss of a right-of-way over the western part of a lot adjoining the property to the east: ..... 36,000.

The claims were dealt with separately by the learned trial judge in a carefully considered judgment.

Kearney J. found that there was no sufficient evidence of loss to justify any allowance in respect of the claim under head 1 above.

In respect of the claim for loss of profits under head 2, the learned judge held that there had been a loss of $28,600 during the period of 22 months.

Dealing with the loss of additional profits under head 3, he found that the suppliant had failed to establish that but for the expropriation proceedings he would have proceeded with the larger structure, which made further consideration of the claim unnecessary.

The claim for expenditures for repairs made following the fire under head 4 was dismissed.

The sum of $11,800 claimed as architect's fees for the preparation of the plans for the large addition said to have been contemplated under head 5 was allowed at $3,500.

The claim for the additional cost of building the addition to the hotel, constructed after the abandonment of the expropriation, over the cost of such work in 1952 under head 6 was considered in connection with the valuation of the property on revesting.

The claim for the services of Mr. Noffke as a valuator and the claim of $7,000 for legal fees, said to have been incurred in connection with the information that was not proceeded with, under head 7 were referred to the registrar for taxation.

For the area retained by the Crown the learned judge allowed $6,021 and, in addition, ten per cent for forcible dispossession (head 8).

For the loss of the right-of-way under head 9 $1,500 was allowed.

While Mr. E. S. Sherwood, called as an expert witness as to values on behalf of the Crown, and Mr. Noffke, who in addition to being an architect was shown to be experienced in valuing land, differed widely as to the value of the lands taken, they were agreed that the property was greater in

value at the date the expropriation was abandoned than when expropriated. Sherwood's valuation of the land and buildings as of the date of the expropriation was $440,743 and as of the date of abandonment $458,050. The learned trial judge accepted the first of these valuations but said that he considered the value at the time of abandonment to be $441,263, the difference being caused by an error made by the witness in the percentage of increase in building costs as between the two dates. I have examined with care the evidence of these two witnesses and I respectfully agree with the conclusion of the learned trial judge that these figures represent the value of the property at the respective dates. While the witness did not state that this was market value, I think it clear that this is what was intended and it was so found by Kearney J.

The reasons for judgment, after saying that market value did not represent the value to the suppliant at these dates, read in part:

> I consider that as of July 19, 1952, the business as a going concern had, exclusive of fixed assets, a value in equity to the suppliant of approximately $100,000. This amount added to $440,743 would raise its value at the time of expropriation to $540,743. In my view, the value to the suppliant of the property on revesting had depreciated because of deprivation of profits amounting to $28,600 plus the sum of $3,500 which I would allow for the cost of plans less the sum of $520 previously referred to, and I would accordingly fix the value of the property to its owner as of May 18, 1954, at $509,163. Because of the foregoing factors included in items (2), (5) and (6) of its claim, I think the suppliant is entitled to succeed to the extent of $31,600 being the depreciation in value to the owner which the instant property suffered in the twenty-two month period during which the respondent retained title to it.

No further details than those above stated were given as to the manner in which the learned judge arrived at the figure of $100,000. While the reference is to "the value in equity to the suppliant", I construe this portion of the judgment as a finding that this amount, added to the market value, was the value to the owner at the respective dates. I do not think the use of the expression "a going concern" was intended to mean that the value of the business itself which was not, of course, expropriated, as distinct from the property on which it was carried on, was $100,000. The learned judge had in the course of his judgment referred to *Cedars Rapids v. Lacoste*[1], dealing with another

[1] [1914] A.C. 569, 6 W.W.R. 62, 16 D.L.R. 168.

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aspect of the matter and, in my opinion, it should be taken that the sum of these two amounts was, in his opinion, the value to the owner with all the advantages which the land possessed, present or future, the compensation to which an owner is entitled as stated at p. 576 of the report of that case.

In cases such as *Diggon-Hibben Ltd. v. The King*[1], and *Woods Manufacturing Co. v. The King*[2], substantial allowances were made for the dislocation of the business carried on due to the dispossession and the cost of establishing it in new premises, but there was nothing of this kind in the present case as there was no evidence that the appellant proposed to establish a hotel business elsewhere and it elected to remain on the premises carrying on its business and the expropriation did not either interrupt it or cause any added expense. Rather was the expense diminished by reason of the exemption from municipal taxation on the land. Since nothing of that nature could accordingly be included in the allowance made, it would appear that the learned judge added the amount of $100,000 as the added value to the owner, owing to the suitability of the premises and their location for the carrying on of a hotel business by it. Since the value of the land was greater when returned than when taken, the only importance of the allowance is its bearing upon the consideration of the amounts allowed for loss of profit.

Thus, in the result, the suppliant has been awarded not merely the full value to it of the lands taken less the value of the property when returned to it but, in addition, $28,600 for loss of profits it might have made had additions to the hotel costing $175,000 been made, similar to those that were proceeded with after the abandonment in the year 1954 and which were only available for use in 1955.

Section 23 of the *Expropriation Act* provides that upon the filing of the plan and description of the land which is required by s. 9 such lands become absolutely vested in the Crown and it is common ground that this was done on July 19, 1952.

[1] [1949] S.C.R. 712, 4 D.L.R. 785.
[2] [1951] S.C.R. 504, 67 C.R.T.C. 87, D.L.R. 465.

Section 24 of the Act, so far as it needs to be considered, reads:

24. (1) Whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the Minister may, by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown, or that it is intended to retain only such limited estate or interest as is mentioned in such writing.

* * *

(4) The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

The appellant's claim is for compensation and must be based entirely upon the provisions of the statute. It is not a claim for damages: *Jones v. Stanstead Railway Company*[1]; *Gibb v. The King*[2]. The Act in terms says no more than that the fact of the revesting shall be taken into account "in connection with all the other circumstances of the case" in determining what compensation is to be paid.

With great respect for the contrary opinion of the learned trial judge, I do not agree that the loss of possible profits amounting to $28,600, considered to have been suffered, may be allowed as a deduction from the value of the property at the date of the abandonment. If any such allowance may be made, it must be dealt with independently as a loss resulting from the expropriation. The value of the property when revested in the suppliant was not diminished by the fact that during the twenty-two month period profits which might have been made had not been realized. If the property had diminished in value during the period, the claim made under this head would be quite distinct from the claim for loss of profit.

In my opinion, in circumstances such as are disclosed by the evidence in this matter, the suppliant is entitled under s. 24(4) to be compensated for such loss as is shown to have been sustained by it which is attributable to the fact that it was deprived of title to the property for a period of 22 months.

[1] (1872), L.R. 4 P.C. 78.
[2] [1918] A.C. 915 at 922, 42 D.L.R. 336.

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The appellant might have ceased its business and removed its furniture and other personal property from the premises in July 1952, in which event it would have been entitled to be paid, in the opinion of the learned trial judge, $540,743. However, of its own motion and with the apparent consent of the Crown, the suppliant remained in possession rent free and operated its business.

I am unable to appreciate how it can be said that by following this course an added liability was imposed upon the Crown.

The allowance was made under head 2 of the suppliant's claim and the reasons for judgment described it "a claim for prospective profit which the suppliant was prevented from realizing during the twenty-two months preceding the abandonment of the expropriation."

The appellant had filed a series of financial statements referring to its operations during the years 1947 to 1957, both inclusive, and it was upon the facts disclosed by these statements that the learned trial judge was invited to assess the loss of profit during the twenty-two month period in question. The judgment dealing with this aspect of the matter reads in part as follows:

> The suppliant, by expending $175,000 during part of the years 1954-55, reaped a net profit of $45,000 in round figures on 1956 operations which dropped to $21,000 in 1957, or an average of $33,000 a year. There is no assurance, however, that, if the suppliant had been permitted to make the same expenditure during 1952, similar profits would have been realized. It is possible but not likely that a loss such as took place in 1950 would have re-occurred. In my opinion, however, it is more probable that the net profit would have exceeded the 1945-50 average by about ten per cent. Under the circumstances, including those considered later, I think that the suppliant, owing to the expropriation followed by revesting, was deprived of a profit of $1,300 a month or $28,600 which it otherwise would have realized during the intervening twenty-two months in question.

There are, in my opinion, upon the evidence in this case, insuperable objections to determining the amount of the alleged loss in this manner.

The fire which took place in August 1951, according to the witness J. P. Maloney, destroyed practically half of the hotel buildings and in respect of this loss the appellant was paid $237,390.47 by various insurance companies. In spite of the receipt of this large sum, the only expenditures made on the buildings up to the date of expropriation were some $30,000 for additions and repairs, which enabled the continuation of the business and the retention of the licence.

According to the witness Noffke, he had received instructions shortly before the expropriation to prepare plans for a large addition to the buildings and these had been partially prepared on July 19, 1952, though the specifications were not prepared. The learned judge found as a fact in disposing of the claim for loss of revenue made under head 3 that the appellant had failed to establish that but for the expropriation proceedings he would have proceeded with this large addition to the buildings.

There is no evidence in this record which indicates that the building of the addition, plans for which were prepared in August 1954 and as to which the architect was only instructed after the notice of abandonment, would have been proceeded with but for the expropriation. Noffke, when asked on cross-examination whether this addition could not have been built during the period between May 1952 and May 1953, answered:

> On account of conditions it was not possible because the money was not available.

The compensation awarded, however, proceeds on the basis that but for the expropriation the appellant would have had in operation the enlarged hotel which, as the evidence shows, was not ready for occupation until September 1955, throughout the period from July 19, 1952, to May 18, 1954. Noffke, whose plan for the addition undertaken in 1954 is dated August 3, 1954, said that it had taken him two or three months to complete the plans from the time they were ordered and that the shortest time required to complete the work would be one and a half years. Assuming that funds had been available in May 1953, the addition would not have been ready for operation until several months after the notice of abandonment was given. He confirmed the fact that there was no talk of constructing the lesser addition to the premises in 1952. In these circumstances, there appears to me to be no foundation for the allowance made, computed in this manner.

Apart from these considerations and with great respect, I do not think that the evidence supports the finding that, assuming the expenditure of $175,000 for the building had been completed on the date of the expropriation, the profits would have exceeded the amount actually realized by $1,300 a month, the figure used at arriving at the compensation of $28,600.

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The financial statements prepared by the company's auditors for the years 1947 to 1957 were put in evidence. These show that in the year 1950, before the fire, the profit from the operation was $4,660.06. In the following year the operations showed a loss of $44,914.73, this result, no doubt, being contributed to by the interruption of the operations caused by the fire. In 1952 the detailed auditors' statement shows a net loss of $8.44, an amount which was amended, however, to show a profit of $4,062, apparently after the accounts had been reviewed by the Income Tax Department. The statement does not appear to be an accurate statement of the result of the operations for that year for the following reasons:— from July 19, 1952, this property was owned by the Crown and as such was exempt from municipal taxation, other than as regards water supply and light and the making and repairing of sidewalks, water courses and drains under the provisions of s. 409 of the charter of the City of Hull (Statutes of Quebec 1893, c. 52, as amended by s. 17 of c. 96 of the Statutes of 1925). No allowance is made in the statement for this fact, taxes being charged in the amount of $7,817.37 as an expense. In addition, an amount of $7,018.43 was charged for maintenance and repairs and $410 for insurance. Since the buildings were the property of the Crown, to the extent that the maintenance and repairs were made after July 19, 1952, the appellant was under no obligation and, to the extent that the charge for insurance referred to insurance on the buildings, the appellant had no insurable interest from that date. The proportion of these expenses attributable to the period after the date of expropriation was not a proper deduction from income and would increase the profit of $4,062 substantially.

For the year 1953 the inaccuracies are more substantial. Throughout the calendar year the lands and buildings were the property of the Crown: yet, as part of the expenses there were charged:

Insurance	$ 531.
Maintenance and repairs	3,046.
Taxes	7,912.
Depreciation of real estate	5,178.

making a total of $16,667. The statement filed on behalf of the appellant showed an operating profit of $2,408 for this year but, adding the deductions mentioned, the operation showed a profit in the neighbourhood of $19,000.

For the year 1954 a loss of $4,581 was shown. Until May 18, 1954, the title remained in the Crown: yet, charges for maintenance and repairs, taxes and depreciation of real estate totalling $14,235 were shown in the statement, a substantial part of which was not properly chargeable.

The learned trial judge was apparently invited to estimate the loss of profit on the footing that the figures submitted were accurate but, as I have indicated, there were grave inaccuracies.

In my opinion, if there was any loss of profits during the period of 22 months the appellant had no claim for compensation, since such loss was occasioned by its voluntary act in remaining in possession rent free during the period. If there was any legal basis for such a claim, I consider that the evidence does not support any award.

I am further of the opinion that the sum of $3,500 allowed as the fees of the architect in preparing the plans for the large addition to the premises under head 5 should not have been awarded. The plans were in fact partially prepared but the learned trial judge has held that it was not shown that the building would have been proceeded with had the property not been expropriated. The appellant could have availed itself of the benefit of these plans after the notice of abandonment had it wished to do so, and suffered no loss attributable to the expropriation.

Under head 7 the appellant claimed to recover a sum of $7,000 which the witness Maloney said he had paid to the late Senator Beauregard for legal fees. No account was put in evidence and no further particulars given in regard to this expenditure. Senator Beauregard was not the solicitor on the record in the present action but appears to have been retained when the information was exhibited by the Attorney General on July 14, 1953. The matter was mentioned by counsel for the Crown at the commencement of the trial, saying that the information had been laid but that, before it had been proceeded with, the appellant had proceeded by way of petition of right and asked permission to withdraw the information without costs. Counsel for the present appellant objected to this, saying that the appellant claimed the amount paid to Senator Beauregard, and the learned judge directed that "this expense will be attached to the

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petition of right." It was this claim that was referred to the registrar for taxation in the judgment appealed from, the learned judge saying:

> I think that the respondent should be required to pay taxable costs for services rendered by the late Senator Beauregard in respect of the information that was laid by the respondent and later withdrawn.

The appellant questions the right of the learned judge to direct the taxation of this account, saying that solicitor and client's costs are not subject to taxation in the courts of Quebec. This objection cannot be given effect to as the costs are payable in respect of the proceedings taken in the Exchequer Court, and those allowable against a party are such as are permitted under the Rules of that Court. While, in strictness, these costs should have been taxed in the action commenced by the Crown, it is clear that the parties agreed that they should form part of the cost of the present action and, accordingly, they may properly be taxed by the registrar. The judgment does not direct whether they are to be taxed upon a party and party or solicitor and client basis. As to this, following the decision in *The Quebec, Jacques-Cartier Electric Company v. The King*[1], I would direct that these be taxed as between solicitor and client.

The judgment referred to the registrar the question as to the allowance to be made to the witness Noffke, provision for which is made in item 42 of the tariff of the Exchequer Court, which is a proper disposition of the matter, in my opinion.

Upon conflicting evidence Kearney J. found the value of the area of 2,007 square feet taken to be $6,021, a finding with which I respectfully agree. The learned judge, however, added to this amount ten per cent for forcible dispossession, for which, in my opinion, there is no warrant in these circumstances.

The claim in respect of the right-of-way over the adjoining lot for which under head 9 $36,000 was claimed was allowed at the trial at the sum of $1,500 and, in my opinion, no ground has been shown upon which this finding should be interfered with.

[1] (1915), 51 S.C.R. 594.

I would, accordingly, allow this appeal in part and reduce the amount of the award to the sum of $7,521 and, in addition, such amounts as are found properly payable by the registrar in respect of the claim for costs for the services of the late Senator Beauregard and for the witness fee payable to the witness Noffke.

I would dismiss the appeal and allow the cross-appeal to the extent indicated and award to the Crown its costs of the proceedings in this court.

Appeal dismissed with costs; motion to vary allowed in part with costs.

Solicitors for the suppliant, appellant: Hyde & Ahern, Montreal.

Solicitor for the respondent: P. Ollivier, Ottawa.

1962
*Nov. 29
Dec. 17

KATHERINE BURKHARDT, Administratrix of the Estate of the late Christian Burkhardt (*Plaintiff*) ..... APPELLANT;

AND

HORST KLAUS BEDER (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Negligence—Equal apportionment of liability—Jury's assessment of damages greater than amount claimed in statement of claim—Amount recoverable.

B was killed instantly when struck by a motor-car driven by the defendant. The plaintiff, who was the widow of B and administratrix of his estate, brought an action for damages under *The Fatal Accidents Act*, R.S.O. 1960, c. 138. The statement of claim as originally delivered claimed general damages under the Act of $15,000 and $300 for funeral expenses. By an amendment made at the opening of the trial, in the absence of the jury, the claim for general damages was increased to $20,000. The jury found that B and the defendant had been equally negligent and assessed the plaintiff's total damages at $26,300. Judgment was entered for the plaintiff for $13,150.

Three days later the trial judge informed counsel that when he endorsed the record he had overlooked the fact that the total claimed for general damages was $20,000 and expressed the opinion that he could not enter judgment for more than one-half that amount. The plaintiff's request for a further amendment was refused and judgment was directed to be entered for $10,150. On an appeal by the defendant and a cross-appeal by the plaintiff, the Court of Appeal gave judgment allowing the appeal, directing a new trial limited to the assessment of damages and dismissing the cross-appeal. The plaintiff appealed to this Court.

Held: The appeal should be allowed, the order of the Court of Appeal set aside and the judgment at trial restored subject to variation.

The charge of the trial judge was adequate, and the sum fixed by the jury, although it may have been somewhat more than this Court would have awarded if it had been its responsibility to decide upon the amount, was not so inordinately high as to constitute a totally erroneous estimate of the plaintiff's loss.

Rule 147 of the Ontario Rules of Practice requires that when damages are claimed the amount shall be named in the statement of claim, and the authorities are clear that judgment cannot be given for an amount greater than that claimed unless an amendment is allowed. The limit of $20,000 placed upon the general damages claimed by the plaintiff in this action was a limit upon the amount recoverable by the judgment of the Court. It was immaterial by what steps the amount due the plaintiff in respect of her cause of action was ascertained and fixed. When so ascertained, judgment may be given thereon but not in excess of the limit fixed by the amount claimed in the prayer for relief. Accordingly, even if no amendment to the statement of claim

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

had been granted the plaintiff would have been entitled to judgment for $13,000 general damages, this being less than the $15,000 originally claimed in the prayer for relief.

Grant v. Hare, [1948] O.W.N. 653; *Kong et al. v. Toronto Transportation Commission*, [1942] O.R. 433, discussed; *Parker v. Hughes*, [1933] O.W.N. 508; *Anderson v. Parney* (1930), 66 O.L.R. 112, not followed.

APPEAL from an order of the Court of Appeal for Ontario, setting aside a judgment of Aylen J. so far as that judgment related to the assessment of damages and directing a new trial restricted to the assessment of damages. Appeal allowed.

L. F. Curran, for the plaintiff, appellant.

R. E. Holland, Q.C., and *G. Scheiffle*, for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from an order of the Court of Appeal for Ontario setting aside a judgment pronounced by Aylen J. after trial of the action with a jury so far as that judgment relates to the assessment of damages and directing a new trial restricted to the assessment of damages.

The action was brought by the appellant, who is the widow of the late Christian Burkhardt and the administratrix of his estate, for damages pursuant to the provisions of *The Fatal Accidents Act*, R.S.O. 1960, c. 138.

None of the children of the late Christian Burkhardt were dependent on him and it is common ground that his widow alone is entitled to damages resulting from his death.

Christian Burkhardt, while crossing O'Connor Drive in Toronto on foot, was instantly killed when struck by a motor-car driven by the respondent.

The statement of claim as originally delivered claimed general damages under *The Fatal Accidents Act* of $15,000 and $300 for funeral expenses. By an amendment made at the opening of the trial, in the absence of the jury, the claim for general damages was increased to $20,000.

The questions put to the jury and their answers are as follows:

Question No. 1: Has the Defendant Horst Klaus Beder satisfied you that he was not guilty of any negligence which caused or contributed to the accident?

Answer "Yes" or "No".

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Answer: No.

Question No. 2:

Was the late Christian Burkhardt guilty of any negligence which caused or contributed to the accident?

Answer "Yes" or "No".

Answer: Yes.

Question No. 3: If your answer to question No. 2 is "yes", in what did such negligence consist?

Answer fully stating all acts of negligence;

(1) Misjudge the speed of the car;

(2) Subsequently failed to keep watch.

Question No. 4: If your answer to question No. 1 is "no" and your answer to question No. 2 is "yes" and you find it practicable to apportion the negligence as between the late Christian Burkhardt and the defendant, in what degrees do you apportion the negligence of:

(a) the defendant Horst Klaus Beder 50%;

(b) the late Christian Burkhardt 50%

Total 100%

Regardless of your answers to the foregoing questions and without any apportionment, at what amount do you assess the total damages of the plaintiff Katherine Burkhardt?

Special damages	$ 300.00
General damages	26,000.00
Total	26,300.00

On these answers Mr. Curran, counsel for the plaintiff, moved for judgment and the transcript continues as follows:

HIS LORDSHIP: That would mean judgment for the plaintiff for $13,150, is that right? In accordance with the verdict of the jury there will be judgment for the plaintiff for $13,150 and costs.

MR. CURRAN: Thank you, my Lord.

MR. HOLLAND: May it please Your Lordship, I wish to ask the judgment not be entered for this sum on the ground that the award, the total award of damages, is not supported in any way by the evidence.

HIS LORDSHIP: I don't agree with you at all. The motion will be denied.

The learned trial judge endorsed the record accordingly and discharged the jury.

Three days later the learned trial judge recalled counsel; he informed them that when he endorsed the record he had overlooked the fact that the total claimed for general damages was $20,000 and expressed the opinion that he could not enter judgment for more than one-half of that amount. Mr. Curran asked for a further amendment but after some discussion this was refused and judgment was directed to be entered for $10,150 and costs.

The defendant appealed only as to the quantum of damages, on the grounds that the amount was excessive and that there had been misdirection and non-direction; he asked that the Court of Appeal re-assess the damages or direct a new trial limited to the assessment of damages.

The plaintiff cross-appealed against the finding of contributory negligence and against the refusal of the learned trial judge to grant the amendment which had been asked for after the jury had made their answers; she asked that judgment be entered for the full amount of the damages assessed by the jury, $26,300; alternatively she asked that if a new trial were ordered it should be at large.

At the conclusion of the argument the Court of Appeal gave judgment allowing the appeal, directing a new trial limited to the assessment of damages and dismissing the cross-appeal.

The Court of Appeal decided that "there was non-direction in the charge amounting to mis-direction upon the question of damages".

With respect, I am of opinion that the charge of the learned trial judge was adequate. He made it clear to the jury that they could give nothing for the injury to the plaintiff's feelings and that the damages were to be limited to a sum commensurate with the pecuniary benefits which she might reasonably have expected from the continuance of her husband's life. He warned them against giving too great weight to the figures given by the actuary who had testified as to the present value of annuities based on the life expectancy of the plaintiff and on the joint expectancy of the plaintiff and her husband. He told them to give consideration to the vicissitudes of life and urged them to reach a figure reasonable and proper having regard to all the facts of the case.

At the time of his death the deceased was 65 years of age and the plaintiff 64. They had been married for 38 years. The deceased was in good health. His earnings were $68 a week plus a Christmas bonus of $100. He had been steadily employed for 33 years with a long-established firm. He was a skilled and conscientious worker and the uncontradicted evidence of his employers was that "he had a job with us for as long as he wished to stay" and that they were having great difficulty in finding anyone to replace him.

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The sum fixed by the jury may be somewhat more than this Court would have awarded if it had been our responsibility to decide upon the amount; but I am unable to say that it was so inordinately high as to constitute a totally erroneous estimate of the plaintiff's loss. In my opinion, the Court of Appeal erred in setting aside the assessment made by the jury.

At the conclusion of Mr. Curran's argument urging that the jury's findings as to contributory negligence should be set aside we were all of the opinion that there was evidence to support those findings and Mr. Holland was not called upon to deal with this point.

I do not find it necessary to deal with the arguments addressed to us by both counsel on the question whether the learned trial judge or the Court of Appeal should have allowed the amendment to the statement of claim which was refused as I have reached the conclusion that on the pleadings as they stood, without amendment, the plaintiff was entitled to judgment for $13,150.

In deciding that unless he granted the amendment he could not enter judgment for more than 50 per cent of the amount claimed, it would seem that Aylen J. regarded himself as bound by the decision of McRuer C.J.H.C. in *Grant v. Hare*[1].

That case was an action for damages for negligence tried with a jury. The plaintiff claimed $5,000. The jury apportioned 70 per cent of the blame to the plaintiff and 30 per cent to the defendant and assessed the plaintiff's total damages at $9,000. Counsel for the plaintiff asked leave to amend the statement of claim by increasing the claim to $9,000. This amendment was refused. Alternatively counsel for the plaintiff argued that judgment should be entered for $2,700 on the pleading as it stood since that amount was less than the sum claimed in the statement of claim. McRuer C.J. held that judgment should be entered for only $1,500. In so holding he purported to follow the decision of the Court of Appeal for Ontario in *Kong et al. v. Toronto Transportation Commission*[2].

In *Kong's* case, the plaintiff claimed, *inter alia,* $1,500 damages under *The Fatal Accidents Act* for the death of his son who was nine years old. The jury attributed 86 per

[1] [1948] O.W.N. 653.

[2] [1942] O.R. 433.

cent of the blame to the defendant and assessed the damages at $3,500. The trial judge endorsed the record directing judgment to be entered for $3,010. Some three weeks later the plaintiff moved for leave to amend the prayer for relief by increasing the amount claimed under this head to $3,010. The trial judge granted the amendment. On appeal the Court of Appeal reversed the order granting the amendment and directed that judgment be entered for $1,500, although had the principle acted upon in *Grant v. Hare* been applied the judgment would have been for only $1,290. This can scarcely have been done through inadvertence for in argument (as appears at p. 434 of the report) counsel for the defendant had submitted that "the plaintiff was entitled only to 86 per cent of the amount claimed" and had cited *Parker v. Hughes*[1].

The judgment in *Parker v. Hughes* is founded on that in *Anderson v. Parney*[2]. It may be that both of these cases are distinguishable from the case at bar as the judgments turn to some extent on the wording of *The Division Courts Act*, R.S.O. 1927, c. 95. If, however, they are not distinguishable I would decline to follow them as they were not applied by the Court of Appeal in *Kong's* case and as I prefer the reasoning of Orde J.A. in his dissenting judgment to that of the majority in *Anderson v. Parney*. In particular I wish to adopt the following passage from the reasons of Orde J.A. at pp. 120 and 121:

> The limit of $120 placed upon the Division Court jurisdiction in personal actions is a limit upon the amount *recoverable* by the judgment of that court. It is immaterial by what steps the amount due the plaintiff in respect of a single cause of action is ascertained and fixed. When so ascertained, judgment may be given thereon, but not in excess of the court's limited jurisdiction.

Rule 147 of the Ontario Rules of Practice requires that when damages are claimed the amount shall be named in the statement of claim, and the authorities are clear that judgment cannot be given for an amount greater than that claimed unless an amendment is allowed.

Adapting the words of Orde J.A. to the circumstances of the case at bar I would say: "The limit of $20,000 placed upon the general damages claimed by the plaintiff in this action is a limit upon the amount recoverable by the judgment of the Court. It is immaterial by what steps the

[1] [1933] O.W.N. 508. [2] (1930), 66 O.L.R. 112.

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Cartwright J.

amount due the plaintiff in respect of her cause of action is ascertained and fixed. When so ascertained, judgment may be given thereon but not in excess of the limit fixed by the amount claimed in the prayer for relief".

It may be observed that in *Parker v. Hughes* the Court was composed of Latchford C.J. and Riddell and Masten JJ.A. While all three held that they were bound by *Anderson v. Parney* both Riddell J.A. and Masten J.A. appear to have regretted that this was so.

It follows from what I have said above that, in my opinion, even if no amendment to the statement of claim had been granted the plaintiff would have been entitled to judgment for $13,000 general damages, this being less than the $15,000 originally claimed in the prayer for relief. No question arises as to the claim for funeral expenses.

I would allow the appeal, set aside the order of the Court of Appeal and direct that the formal judgment of the learned trial judge be varied by striking out paragraph 1 thereof and substituting the following:

> This Court doth order and adjudge that the plaintiff do recover from the defendant the sum of Thirteen thousand, one hundred and fifty dollars ($13,150).

and that subject to this variation the judgment at the trial be restored.

The appellant is entitled to her costs of the appeal to the Court of Appeal and of the appeal to this Court. There should be no order as to the costs of the cross-appeal to the Court of Appeal.

Appeal allowed, order of Court of Appeal set aside and judgment at trial restored subject to variation.

Solicitors for the plaintiff, appellant: Wright & McTaggart, Toronto.

Solicitors for the defendant, respondent: Bassel, Sullivan, Holland & Hardisty, Toronto.

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THE ECONOMICAL FIRE INSURANCE COMPANY (*Defendant*) .... } APPELLANT;

*Nov. 7
Nov. 28

AND

JAMES D. CHERRY & SONS LIMITED (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contracts—Insurance—Agency—"Expirations" to remain property of general agent on termination of contract—Company soliciting sub-agents for direct agency agreements—Whether breach of contract.

By clause 9 of a contract under which the defendant insurance company appointed the plaintiff as its general agent in the fire insurance business in the Province of Quebec, it was provided that in the event of its termination without the agent being in default, his records, use and control of "expirations" would be deemed his property and left in his undisputed possession. During the lifetime of the agreement the plaintiff had accumulated a considerable number of sub-agents who were in possession of "expirations" relative to the fire insurance written by them. After the termination of the contract the defendant insurance company invited a number of the plaintiff's sub-agents to place their renewal fire insurance business with it on a direct basis, thus obtaining the advantage of the "expirations" in respect of the renewal of any fire insurance policy placed by these sub-agents for the plaintiff. The trial judge awarded damages for breach of contract. This judgment was affirmed by the Court of Queen's Bench. The defendant insurance company appealed to this Court.

Held: The appeal should be dismissed.

On the facts of this case the defendant insurance company had violated the terms of clause 9 of the agreement. In dealing, as it did, with the plaintiff's sub-agents the defendant obtained for its own use in effecting renewals of fire insurance the benefit of "expirations", the "use and control" of which it had agreed should be "deemed to be the property" of the plaintiff and "left in his undisputed possession". There were no reasons to disturb the amount of the award.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Smith J. Appeal dismissed.

Antoine Geoffrion, Q.C., for the defendant, appellant.

Charles Holdstock, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec[1] dismissing an appeal from the judgment of Smith J. of the

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

[1] [1961] Que. Q.B. 476.

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THE ECONOMICAL FIRE INS. CO. v. CHERRY & SONS LTD.

Ritchie J.

Superior Court of the City of Montreal which awarded to the respondent damages in the sum of $8,000 as compensation for loss caused by the appellant's violation of para. 9 of a certain agency agreement dated November 19, 1937, whereunder the respondent and its predecessor had operated as a "general agent" for the appellant in the fire insurance business in the Province of Quebec for seven years prior to the termination of the agreement by the appellant in July 1944. The sole issue in this appeal is whether, after termination, the appellant violated the provisions of the said para. 9 by entering into "direct agency" agreements with certain of the respondent's former sub-agents and thereby turning to its own account some of the "good will" accumulated by the respondent in its capacity as the appellant's general agent.

Paragraph 9 of the agency agreement reads as follows:

> 9. In the event of termination of this Agreement, the Agent not being in default and thereafter promptly accounting for and paying over balances not in default for which he is liable, the Agent's records, use and control of expirations shall be deemed the property of the Agent and left in his undisputed possession; otherwise the records, use and control of expirations shall be vested in the Company.

The word "expirations" as used in this context has a meaning peculiar to the insurance business which is well defined in the decision of the United States Federal Court of Appeals in *V. L. Phillips & Company v. Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Company*[1]:

> (1) "Expirations" in the insurance field has a definite and well recognized meaning; it embodies the records of an insurance agency by which the agent has available a copy of the policy issued to the insured or records containing the date of the insurance policy, the name of the insured, the date of its expiration, the amount of insurance, premiums, property covered and terms of insurance. This information enables the agent to contact the insured before the existing contract expires and arms him with the information essential to secure another policy and to present to the insured a solution for his insurance requirements. It has been determined that this information is of vital assistance to the agency in carrying on the insurance business and it has become, in the insurance field, recognized as a valuable asset in the nature of good will.

During the lifetime of the agreement the respondent had accumulated a very considerable number of sub-agents who were in possession of "expirations" relative to the fire insurance written by them. During the same period the appellant had been operating a branch office in the Province of Quebec

[1] (1952), 199 F. (2d) 244 at 246.

for the writing of casualty insurance business, and for this purpose it had acquired a number of agents, some of whom were also sub-agents for the respondent in the fire insurance business.

On December 4, 1944, the appellant circularized such of its casualty insurance agents as had not been sub-agents of the respondent before entering the casualty field, inviting them to enter into "direct agency" agreements for the sale of fire insurance, and in so doing it was, in effect, inviting a number of the respondent's sub-agents to place their renewal fire insurance business with it on a "direct" basis. It is not difficult to see that by making the respondent's sub-agents its own direct agents it would obtain the advantage of the expirations in respect of the renewal of any fire insurance policy placed by such sub-agent for the respondent.

The essential facts are really not in dispute and the elaborate arguments made on behalf of the appellant to justify the course followed by it in this case have been reviewed by the Court of Queen's Bench and were, in my view, very fully and properly dealt with in the exhaustive decision of the learned trial judge who concluded that:

> While it may be true that the records of the sub-agents relating to insurance written by them, were their own property as between themselves and the plaintiff; the defendant's contract with the plaintiff made such records the exclusive property of the plaintiff and subject to its absolute control, and the defendant had no right to make use of said expirations by the simple expedient of constituting the former sub-agents its own agents and then accepting through them renewals of insurance formerly written by the said sub-agents for the account of the plaintiff.

I do not think that the reasons for judgment of the Courts below are to be construed as deciding that the good will of a general agent becomes his absolute property free from all future competition from the insurance company on the termination of an agreement such as the present one nor do I think, as was suggested by counsel for the appellant, that these judgments have the effect of transforming para. 9 into a covenant in restraint of trade. This case should not, in my view, be construed as going further than deciding that the action here taken by the insurance company constituted a breach of the paragraph in question.

It is neither necessary nor desirable to lay down any rules of general application regulating the conduct of insurance companies in competing for business originally written by

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Ritchie J.

a general agent whose contract has been terminated. Each case must, of course, depend on the terms of the agency agreement in question and the acts of the parties in relation thereto. It is sufficient for the purposes of this case to say that in dealing, as it did, with the respondent's sub-agents the appellant obtained for its own use in effecting renewals of fire insurance the benefit of "expirations", the "use and control" of which it had agreed should be "deemed to be the property" of the respondent and "left in his undisputed possession". In so doing, the appellant violated the terms of its agreement.

The learned trial judge fixed the damages at $8,000 and, like the judges of the Court of Queen's Bench, I can see no reason for disturbing this award.

For these reasons, as well as those stated by the learned trial judge, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Geoffrion & Prud'homme, Montreal.

Attorney for the plaintiff, respondent: C. Holdstock, Montreal.

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*Dec. 13

LIONEL OUELETTE (*Defendant*) .....APPELLANT;

AND

JOHN JOHNSON (*Plaintiff*) .....RESPONDENT.

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Jan. 22

LIONEL OUELETTE AND FERRIER TURCOTTE (*Defendants*) .....APPELLANTS;

AND

GLADYS TOURIGNY AND TERRY TOURIGNY infants under the age of 21 years by their next friend Hazel Agnes Kennefic and the said HAZEL AGNES KENNEFIC, personal representative of James Leo Kennefic deceased (*Plaintiffs*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Passengers carried pursuant to agreements for particular journeys—One passenger injured and another killed—Whether vehicle "operated in the business of carrying passengers for compensation"—Liability of owner—The Highway Traffic Act, R.S.O. 1960, c. 172, s. 105(2).

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*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Ritchie JJ.

The defendant while carrying two passengers in his motor vehicle was involved in a collision with another motor vehicle, as a result of which one of the passengers, the plaintiff J, was seriously injured, and the other passenger, the husband of the plaintiff K, was killed. J and K had made separate arrangements with the defendant whereby the latter agreed to provide them with transportation, at a fixed rate, from their place of employment to their family homes and return on week-ends. It was while they were being driven by the defendant pursuant to these agreements that the accident occurred. The trial judge, who held that the collision was caused solely by the negligence of the defendant, was of the opinion that at the time of the accident the defendant's automobile was being "operated in the business of carrying passengers for compensation", within the meaning of s. 105(2) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, and gave judgment for the plaintiffs. The Court of Appeal upheld the decision of the trial judge.

Held: The appeals should be dismissed.

The principle enunciated in *Lemieux v. Bedard*, [1953] O.R. 837, that one who enters into an agreement to transport other persons in his automobile on a particular journey, in return for payment of an agreed sum of money, and proceeds to carry out the agreement, makes it his business on that occasion to carry passengers for compensation, and will not be relieved by s. 105(2) of *The Highway Traffic Act* from liability for his negligence, even if there is no evidence that he has engaged in the business on any other occasion, was correct and applied *a fortiori* to the present case in which the arrangement was carried out week after week.

Wing v. Banks, [1947] O.W.N. 897, approved; *Csehi v. Dixon*, [1953] O.W.N. 238, disapproved.

APPEALS from two judgments of the Court of Appeal for Ontario, dismissing two judgments of Aylen J. Appeals dismissed.

Andrew Brewin, Q.C., and *Maurice Lacourciere*, for the defendants, appellants.

P. B. C. Pepper, Q.C., and *F. L. Gratton*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—These appeals, which were argued together, are from two judgments of the Court of Appeal for Ontario pronounced on February 6, 1962, dismissing without recorded reasons appeals from two judgments of Aylen J. pronounced on May 30, 1961.

On November 21, 1959, John Johnson and the late James Leo Kennefic were riding as passengers in a motor vehicle owned and driven by the appellant, which came into collision with another motor vehicle on Highway Number 17 in the Town of Copper Cliff in the Province of Ontario. Johnson was seriously injured and Kennefic was killed.

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Cartwright J.

Aylen J. held that the collision was caused solely by the negligence of the appellant and gave judgment in favour of the respondent Johnson for $14,945.35 and in favour of the respondent Hazel Agnes Kennefic, the widow of the late James Leo Kennefic, for $22,300 apportioned between her and her two infant children.

In this Court no question is raised as to the findings of negligence or the assessment of damages. The sole question is whether the appellant is relieved from liability by the terms of subs. 2 of s. 105 of *The Highway Traffic Act,* R.S.O. 1960, c. 172.

Section 105 reads as follows:

105 (1) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner.

(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

In July 1959, the appellant commenced working at Consolidated-Denison Mine near Elliot Lake, Ontario. Johnson and Kennefic commenced work at the same mine early in September 1959.

Ouelette, Kennefic, and Johnson all lived in or near Sudbury which is some 128 miles east of Elliot Lake. It was their usual practice, however, to stay at lodgings provided by the company at the mine head during the work week and to go to and from their family homes in the Sudbury area on week-ends. There was no train connection between Elliot Lake and Sudbury and the only method of transport between the mine and the parties' homes in Sudbury was by private automobile or by bus. The bus fare was $4.20 for a one-way trip. Before getting work at the Consolidated-Denison Mine, Johnson had travelled by bus to Sudbury for the week-end a few times, and both he and Kennefic had driven to Sudbury on a number of occasions with a fellow employee, Dionne, to whom they each paid $2 each way.

In September 1959, Ouelette purchased an automobile. The evidence is that thereafter he drove to Sudbury on the week-ends alone on at least three occasions. He said that the cost of gasoline and oil for a one-way trip from Elliot Lake to Sudbury was approximately $4.

In late September or early October Johnson asked Ouelette if he would drive him to Sudbury on the week-ends. Ouelette agreed to do so. The learned trial judge has found, and his finding is supported by the evidence, that it was agreed that Johnson would pay $2 each way for the week-end trips and that later the same agreement was made between Ouelette and Kennefic. It was while Johnson and Kennefic were being driven by Ouelette pursuant to these agreements that the accident occurred. They had been driven by him under the same agreements on several prior week-ends. The learned trial judge has found that Johnson and Kennefic either paid or obligated themselves to pay for all of these trips at the rate mentioned. He also found that the amount agreed to be paid was not based on the cost of gas or oil but on the amount Johnson had previously paid to Dionne.

On these facts the learned trial judge was of opinion that at the time of the accident Ouelette's automobile was being "operated in the business of carrying passengers for compensation", within the meaning of s. 105(2), and gave judgment for the plaintiffs. In so doing he followed, *inter alia*, the case of *Wing v. Banks*[1], a judgment of Gale J. which was affirmed, without recorded reasons, by the unanimous judgment of the Court of Appeal composed of Fisher, Laidlaw and Roach JJ.A. In my view that case was rightly decided and is indistinguishable from the case at bar. I agree with the conclusion of the learned trial judge.

In the course of the full and helpful arguments addressed to us by both counsel almost all, if not all, of the reported cases dealing with s. 105(2) or its predecessors were examined and discussed. Some of them are not easy to reconcile with others. It is not necessary for the decision of this appeal to examine them as I am satisfied that the facts of the case at bar bring it clearly within the *ratio decidendi* of those cases of which *Wing v. Banks, supra,* is a leading example, I wish to add only the following observations.

[1] [1947] O.W.N. 897.

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Cartwright J.

In my opinion the principle enunciated in the judgment of the Court of Appeal in *Lemieux v. Bedard*[1] is correct. It is accurately summarized in the headnote as follows:

> One who enters into an agreement to transport other persons in his automobile on a particular journey, in return for payment of an agreed sum of money, and proceeds to carry out the agreement, makes it his business on that occasion to carry passengers for compensation, and will not be relieved by s. 50(2) (now s. 105(2)) of The Highway Traffic Act from liability for his negligence, even if there is no evidence that he has engaged in the business on any other occasion.

This principle applies *a fortiori* to the case at bar in which the arrangement was carried out week after week.

I do not wish to be understood as approving the judgment of the Court of Appeal in *Csehi v. Dixon*[2]. In that case the Court accepted the decision in *Wing v. Banks* but found themselves able to distinguish it on the ground that the amount of the fixed fee agreed to be paid by the plaintiff to the defendant for transporting him was arrived at by estimating a portion of the cost of the gasoline and oil used by the defendant. In my respectful view, once it has been determined that the arrangement between the parties was of a commercial nature the manner in which the amount of the fee to be paid was decided upon becomes irrelevant.

I would dismiss both appeals with costs.

Appeals dismissed with costs.

Solicitors for the defendants, appellants: Lacourciere & Lacourciere, Sudbury.

Solicitors for the plaintiff, respondent, John Johnson: Hawkins & Gratton, Sudbury.

Solicitors for the plaintiffs, respondents, Gladys Tourigny et al.: Valin & Valin, Sudbury.

[1] [1953] O.R. 837.

[2] [1953] O.W.N. 238, 2 D.L.R. 202.

HERVE BARLOW (*Plaintiff*) .....APPELLANT;

AND

HARRY COHEN (*Defendant*) .....RESPONDENT.

1962

*Oct. 18
Nov. 28

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Real property—Servitude—Passageway—Sale of part of dominant land non-contiguous to servient land—Whether servitude extinguished—Whether servitude by destination created—Action confessoire—Civil Code, arts. 549, 551, 556.

The plaintiff was the owner of a property on Sherbrooke Street in Montreal bearing civic number 1525. The defendant owned number 1529 immediately to the west, the fence between these two properties being common. The defendant also owned the immediate adjacent property to the west bearing number 1535. Prior to 1899 these three implacements belonged to one owner. This owner sold part of the lot to Mrs. C M who had houses 1525 and 1529 built. Under the deed of sale, provision was made for a passageway between the property remaining with the vendor and the property sold to the purchaser. Subsequently, Mrs. C M sold number 1525 to Miss A M. This deed contained no reference to the passageway. Later Mrs. C M sold number 1529 to B. This deed referred to the passageway for the use in common of the owners of numbers 1529 and 1535. A similar reference is contained in the subsequent deeds of conveyance of number 1529 up to and including the defendant's deed of acquisition. The plaintiff acquired number 1525 from the purchaser through Miss A M and his deed contained no reference to the passageway. There was no evidence that a gate in the dividing fence between numbers 1525 and 1529, which has been in existence from and after 1914, had existed prior to that date.

The plaintiff instituted this *action confessoire* to obtain a declaration that number 1529 was charged with a servitude of passage in favour of number 1525 in order to reach the passageway over which the plaintiff also claimed to have a right of passage. The trial judge maintained the action. This judgment was reversed by the Court of Queen's Bench. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The plaintiff has never acquired a servitude consisting in the right of passage over the land belonging to the defendant upon which the building number 1529 was erected. No servitude can be established without a title, and when the existence of a right of servitude is in doubt, that doubt must be resolved in favour of the servient land. The authorities under art. 556 of the *Civil Code* are clear that while the purchaser of a portion of the dominant land may have a right to exercise a servitude over the servient land, in common with his vendor, it does not follow that such purchaser is entitled to make use of his vendor's property in order to exercise such right. Moreover, when Mrs. C M sold number 1525, which was not contiguous to the passage, without referring to it, and without creating any additional servitude

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

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over the land retained by her, that sale had the effect of extinguishing any servitude which might have existed in favour of the part sold on that date. Furthermore, the mere existence since the year 1914 of a gate in the common fence was not sufficient to establish a servitude by destination under art. 551 of the Code and no such servitude was created.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Batshaw J. Appeal dismissed.

Peter R. D. MacKell, for the plaintiff, appellant.

H. L. Aronovitch, for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a judgment rendered by the Court of Queen's Bench[1] which allowed respondent's appeal from a judgment of the Superior Court and dismissed appellant's action with costs, Bissonnette J. dissenting.

The facts which are fully set out in the judgments below are really not in dispute. Appellant is the owner of a property upon which is erected a building bearing civic number 1525 Sherbrooke Street West, in the city of Montreal. This property measures twenty feet in width, by a depth of approximately one hundred and fifty-eight feet.

Respondent is owner of the property immediately to the west of appellant's property, with a building erected thereon bearing civic number 1529 Sherbrooke Street West, the easterly wall of which is *mitoyen* with appellant, the said property measuring thirty-six feet in width, by approximately one hundred and fifty feet in depth. Respondent is also the owner of the immediately adjacent property to the west, measuring twenty-seven feet in width by approximately one hundred and thirty feet in depth, upon which is erected the building bearing civic number 1535 Sherbrooke Street West.

Prior to April 5, 1899 these three emplacements—all of which are unsubdivided parts of original lot 1728 on the Official Plan and Book of Reference of St-Antoine Ward—belonged to one Thomas Collins. For purposes of convenience, I shall hereafter refer to the three properties in question by the present civic numbers of the buildings erected thereon.

[1] [1961] Que. Q.B. 453.

By Deed of Sale executed April 5, 1899, before W. de M. Marler, notary, the said Thomas Collins sold to Mrs. C. J. McCuaig the vacant land upon which the buildings bearing civic numbers 1525 and 1529 Sherbrooke Street West are now located. Under the said deed, provision was made for a passageway nine feet in width by seventy-five feet in depth running back from Sherbrooke Street, between the properties of the vendor and purchaser, the clause providing for such passage reading as follows:

> A strip of land of four feet six inches, English measure, off the South West side of the said sold property by a depth of about seventy-five feet from the said Sherbrooke Street, with a similar strip of like width and depth off the adjoining property, belonging to the Vendor, forms a passage of nine feet, English measure, in width, for the use in common of the property now sold and the property of the said Vendor, and the said passage is to be kept, used and maintained as such by the Purchaser & by the said Vendor their respective heirs & assigns forever.
>
> The Purchaser will have the right to place openings on the said passage for light.

Some time prior to the 21st of April 1902 Mrs. McCuaig appears to have built the two houses now bearing civic nos. 1525 and 1529, and on that date by deed before E. H. Stuart, notary, she sold no. 1525 to a Miss Agnes McDougall. This deed contained no reference to the passage in question.

On August 31, 1911, by deed before H. M. Marler, notary, Mrs. McCuaig sold no. 1529 to W. A. Black. This deed does refer to the said passage and, after describing it, goes on to say:

> for the use in common of the piece of land now sold and the property of the said George H. Smithers, which passage is to be kept, used and maintained as such by the purchaser and the said Henry James Taylor (previously mentioned as being the owner of No. 1535) their respective heirs and assigns forever, the owners of either side of the said passage having the right to place openings on the said passage for light.

A similar reference is contained in the subsequent deeds of conveyance of no. 1529 up to and including respondent's deed of acquisition.

On May 3, 1945, by deed before Lucien Morin, notary, appellant acquired no. 1525 from Chas. M. Black and this deed states that Mr. Black had acquired the property from Miss McDougall on November 20, 1920, by deed before J. A. Cameron, notary. Appellant's deed of acquisition from Charles Black contains no reference to the passageway.

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Abbott J.

The only other facts to which reference need be made are that from and after 1914 a gate appears to have existed in the *mitoyen* fence separating the rear parts of no. 1525 and no. 1529. The Court below found that there is no evidence to establish the existence of such a gate prior to 1914 and I am in agreement with that finding. It also appears to be common ground that Charles M. Black was a son of W. A. Black and that for some considerable time after 1920 there was a close family relationship between the owners of no. 1525 and no. 1529.

The present *action confessoire* was taken by appellant to obtain a declaration that respondent's property, no. 1529 Sherbrooke Street West, was charged with a servitude of passage in favour of appellant's property no. 1525 in order to reach the nine foot lane over which appellant also claims to have a right of passage.

No servitude can be established without a title, and possession even immemorial is insufficient for that purpose (art. 549 C.C.). The fact that over a period of years a gate existed in the fence between no. 1529 and no. 1525, and that the occupants of no. 1525 crossed the rear of no. 1529 to reach the nine foot passage, does not create any presumption that they did so in virtue of a servitude. It is obvious that the existence of a right of passage, such as that claimed by appellant, would preclude the owner of no. 1529 from building on the rear part of his land, while the owner of no. 1525 would suffer no such limitation on his rights as owner. One is never presumed to have created a servitude upon one's property and when the existence of a right of servitude is in doubt, that doubt must be resolved in favour of the servient land—*Cross v. Judah*[1]; *Coulombe v. Société Coopérative Agricole de Montmorency*[2], *per* Rinfret C.J.

Basing his claim however upon the sale made by Mrs. McCuaig to his *auteur* Miss McDougall, appellant's contention is that he is entitled to a servitude consisting in the right of passage over the land belonging to respondent in order to exercise a right of passage in the nine-foot lane above referred to, by reason of the provisions of art. 556 C.C. which reads:

> If the land in favor of which a servitude has been established come to be divided, the servitude remains due for each portion, without however the condition of the servient land being rendered worse.

[1] (1871), 15 L.C.J. 264.

[2] [1950] S.C.R. 313 at 323.

Thus in the case of a right of way, all the co-proprietors have a right to exercise it, but they are obliged to do so over the same portion of ground.

Article 556 C.C. is in virtually the same terms as art. 700 of the *Code Napoléon* and decisions of the French courts and comments of the French authors are therefore applicable. From these authorities it is clear that in France the principle enunciated in art. 700 C.N. applies only to the rights of the owner (or owners) of the dominant land over the servient land, and that while the purchaser of a portion of the dominant land may have a right to exercise the servitude over the servient land, in common with his vendor, it does not follow that such purchaser is entitled to make use of his vendor's property in order to exercise such right. Demolombe t. 12, Des servitudes (2), p. 372, no. 865; Baudry-Lacantinerie, Traité de Droit Civil, t. VI, p. 871; Tribunal Civil Seine, 9 juillet 1900, Gazette du Palais, Table Quinquennale 1897 à 1902, p. 580; Pandectes Français, Répertoire: t. 51, p. 686.

The law in the Province of Quebec as to the interpretation and effect of art. 556 C.C. is similar to the law in France and I am in agreement with the view expressed by the majority in the Court below that appellant has never acquired a servitude consisting in the right of passage over the land belonging to respondent, upon which the building bearing civic no. 1529 Sherbrooke Street West is erected.

Moreover, as I have stated, no. 1529 was built by Mrs. McCuaig along the line of the passage and extended back a distance of some sixteen feet beyond the end of that passage. She later sold no. 1525, which is not contiguous to the passage, without referring to it, and without creating any additional servitude over the land retained by her. In my opinion this sale had the effect of extinguishing any servitude which prior to April 21, 1902, may have existed in favour of the part sold on that date to Miss McDougall. *Gosselin v. Charpentier*[1].

Neither the learned trial judge nor Bissonnette J. were of the view that appellant was entitled to benefit from the provisions of art. 556 C.C. Both learned judges appear to have held that a servitude by destination under art. 551 C.C.

[1] (1909), 19 Que. K.B. 18.

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BARLOW
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Abbott J.

had been established. The mere existence since the year 1914 of a gate in the *mitoyen* fence between no. 1525 and no. 1529 is not sufficient to establish a servitude by destination and I agree with the finding of the Court below that no such servitude was created.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Walker, Chauvin, Walker, Allison, Beaulieu & Tetley, Montreal.

Attorneys for the defendant, respondent: Chait & Aronovitch, Montreal.

1962
*Nov. 2
Dec. 17

THE LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA (*Defendant*) ..... APPELLANT;

AND

CANADIAN MARCONI COMPANY (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance—Travel accident policy—Clause excluding liability if insured intoxicated—Liability also excluded if death caused by disease or natural causes—Burden of proof—Blood sample showing quantity of alcohol.

The plaintiff company claimed under a travel accident insurance policy, issued by the defendant company, in respect of the accidental death of W, one of its employees covered by the policy. W was killed when driving alone and when, after swerving back and forth across the highway a number of times, his car left the road and collided with a tree. The policy excluded indemnity in the event that the insured was "in a state of intoxication" or if the death was caused "by disease or natural causes". The defendant company denied liability on the ground that the accident occurred whilst W was in a state of intoxication within the meaning of the policy. The evidence disclosed that W had been drinking about an hour previously and a blood test made three days after the death disclosed a high content of alcohol. The trial judge maintained the action and this judgment was affirmed by the Court of Queen's Bench. The defendant company appealed to this

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

Court and a further ground of appeal was based on an observation made by Owen J. of the Court of Queen's Bench that the deceased might have felt "faint or ill' which would mean that the death was caused "by disease or natural causes".

Held: The appeal should be dismissed.

The circumstances of this accident were not sufficient to discharge the burden assumed by the defendant of proving by a predonderance of evidence that W was in a state of intoxication or that his death was caused or contributed to by disease or natural causes, nor was there any evidence as to his behaviour on that day which would make such a conclusion any more probable. There were concurrent findings on the question of fact as to whether W was intoxicated or not, and these findings should not be disturbed.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Demers J. Appeal dismissed.

L. P. de Grandpré, Q.C., and *Guy Gilbert,* for the defendant, appellant.

Hazen Hansard, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec[1] (Tremblay C.J. and Choquette J. dissenting) dismissing an appeal from a judgment of Demers J. of the Superior Court for the District of Montreal which had maintained the respondent's action against the appellant for $25,000 in respect of the accidental death of Mr. Ronald J. Williams, one of the respondent's senior employees, who was an "Insured Person" under the provisions of a Travel Accident Insurance Policy issued by the appellant to the respondent as the "Insured". The policy in question provided, *inter alia,* that:

> The Company hereby agrees to make to the Insured, payments as detailed hereunder when any Insured Person sustains bodily injuries (hereinafter referred to as "such injuries") *caused solely by accidental means and resulting directly and independently of all other causes from the said accidental means* . . . .
>
> * * *
>
> Unless endorsed hereon by the Company to the contrary, this Policy does not cover death, injury or disablement:
>
> (3) Directly or indirectly caused or contributed to by intentional self-injury, by disease or natural causes, by suicide or attempted suicide (whether felonious or not), by provoked assault, by dueling or by fighting (except in bona fide self-defense).
>
> * * *

[1] [1962] Que. Q.B. 396.

1962

LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA v. CANADIAN MARCONI CO.

Ritchie J.

(5) Resulting from the Insured Person's own criminal act or from bodily injury occasioned or occurring whilst he is in a state of insanity (temporary or otherwise) or intoxication.

Mr. Williams was killed as the result of an accident which occurred at 6:35 p.m. on July 22, 1956, while he was driving alone to the Dorval Airport, and when, after swerving back and forth across the highway a number of times, his car left the right-hand side of Côte de Liesse Road and collided with a large tree.

In view of the nature of the accident and the evidence that the deceased had had two 1½-oz. drinks of whisky about an hour previously and that a blood test made three days after the death purported to disclose a finding of 2.3 parts per 1000 by weight of alcohol in the deceased's blood, the appellant company denied liability on the ground that the accident occurred whilst Mr. Williams was "in a state of . . . intoxication" within the meaning of exclusion 5 of the policy.

In the course of his reasons for judgment in the Court of Queen's Bench, Owen J. observed that the accident was consistent with explanations other than intoxication, saying, *inter alia,* that "Williams might have felt faint or ill . . . .", and it is in relation to this observation that the appellant invokes exclusion 3 on the ground that such an explanation would mean that the death was caused "by disease or natural causes" and that it was, therefore, an event for which no indemnity was provided by the policy.

In light of all the evidence, I do not think that the circumstances of this accident are sufficient to discharge the burden assumed by the appellant of proving by a preponderance of evidence that Mr. Williams was in a state of intoxication or that his death was caused or contributed to by disease or natural causes, nor do I think that there was any evidence as to his behaviour on the day of his death which would make such a conclusion any more probable.

The remarkable feature of this case, however, is that although Mr. Williams was said to be "perfectly normal" an hour before death after having had two drinks of whisky, the blood test made three days later is consistent with his having consumed the equivalent of approximately 16 ounces of whisky during the day of his death. If no evidence had been tendered to explain this anomalous result, it would

unquestionably have supported the theory that the deceased, in some unexplained manner, had consumed enough additional alcohol between 5:25 and 6:35 p.m. to induce a state of intoxication in the average man. The evidence of Dr. Rabinovitch which appears to have been accepted by the learned trial judge and the majority of the judges of the Court of Queen's Bench was, however, to the effect that in the particular circumstances of this case the appearance of the presence of indicia of high alcoholic content in the blood disclosed by the test was probably due to natural processes operating after death and that the result of that test was not to be relied upon as indicating the amount of alcohol consumed by Williams.

The conclusion reached by both of the Courts below is, in my view, succinctly stated by Mr. Justice Owen in the last paragraph of his reasons for judgment where he says:

> . . . I would conclude that the Appellant did not discharge the burden imposed by the civil law of proving according to the balance of probabilities that Williams was intoxicated at the time of the accident which caused his death and I would dismiss the present appeal with costs.

The question of whether Mr. Williams was intoxicated or not is a question of fact, and as the learned trial judge and the majority of the Court of Queen's Bench are in agreement with respect to that question, I cannot express my opinion in more apt words than those employed by Taschereau J. in *American Automobile Insurance Company v. Dickson*[1], where he said:

> Although I have been impressed by the able arguments of counsel for the appellant, I feel it impossible to hold that intoxication was sufficiently proven, without violating the well-known rule established before this Court by a long series of judicial pronouncement, and which is that "concurrent findings" should not be disturbed, unless they cannot be supported by the evidence.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Tansey, de Grandpré, de Grandpré, Bergeron & Monet, Montreal.

Attorneys for the plaintiff, respondent: Common, Howard, Cate, Ogilvy, Bishop & Cope, Montreal.

[1] [1943] S.C.R. 143 at 149, 2 D.L.R. 15.

1962
*Nov. 29, 30
1963
Jan. 22

THE CLARKSON COMPANY LIMITED, TRUSTEE IN BANKRUPTCY OF L. DI CECCO COMPANY LIMITED, and THE SISTERS OF ST. JOSEPH FOR THE DIOCESE OF TORONTO IN UPPER CANADA (*Defendants*) .....APPELLANTS;

'64 1 OR 64

AND

ACE LUMBER LIMITED and DANFORD LUMBER COMPANY LIMITED, carrying on business under the firm name of CADILLAC LUMBER (*Plaintiffs*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Construction equipment supplied on rental basis—Whether liens created in respect of rentals charged—The Mechanics' Lien Act, R.S.O. 1960, c. 233, s. 5.

A subcontractor, engaged to erect form work for concrete floors, columns and other portions of specific buildings on lands owned by the Sisters of St. Joseph, contracted with A Ltd. and D Ltd. for the rental of certain construction equipment. The subcontractor later became bankrupt, and, in a mechanics' lien action, A Ltd. and D Ltd. filed claims in respect of the rentals charged for the said equipment. These claims were rejected by the master but were allowed on appeal to the Court of Appeal by a majority decision. An appeal was then brought to this Court.

Held: The appeal should be allowed.

While *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien claimant is a person to whom a lien is given by it.

The submission that the price of the rental of the equipment was the proper subject-matter of a lien within the meaning of s. 5 of the Act on the ground that such rental constituted "the performance of a service" in respect of the constructing and erecting of the buildings in question, or alternatively, that it constituted the furnishing of materials used in the construction and erection thereof, was rejected. As the equipment was neither furnished for the purpose of being incorporated nor incorporated into the finished structure of the buildings and as it was not consumed in the construction process, it could not be said to have been "material" furnished "to be used in the constructing or erecting of the building" within the meaning of the section. Also, the lien created by s. 5(1) in respect of "materials" furnished was a lien for the "price of" such "materials". This was a different thing from the price of the rental of materials and it was illogical to suppose that the legislature intended to create a lien for the "price" of the materials in favour of a person who never parted with title to them, who supplied them on the understanding that they would be returned and to whom they were in fact returned.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

The word "performs" in s. 5 was to be taken as connoting some active participation in the performance of the service on the part of the lien claimant. Having regard to the rule of construction applicable in the circumstances, the respondents, by merely making their equipment available at a fixed rental, could not be said to be persons who performed any service upon or in respect of the building within the meaning of the section.

Timber Structures v. C.W.S. Grinding & Machine Works, 229 P. 2d 623, referred to; *Crowell Bros. Ltd. v. Maritime Minerals Ltd. et al.* (1940), 15 M.P.R. 39, approved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from the report of Bristow, Master, in a mechanics' lien action. Appeal allowed.

C. A. Thompson, Q.C., and *J. W. Craig*, for the defendants, appellants.

R. E. Shibley and *J. W. McCutcheon*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] (Kelly J.A. dissenting) allowing the mechanics' lien claims asserted in this action by Acrow (Canada) Limited (hereinafter referred to as Acrow) and Dell Construction Company Limited (hereinafter referred to as Dell) in the sums of $10,380.29 and $20,632.59 respectively, being the price of the renting of certain construction equipment to L. Di Cecco Company Limited for the purpose of facilitating the carrying out by the latter company of a subcontract to erect form work for concrete floors, columns and other portions of certain buildings known as the House of Providence, situate on lands owned by the Sisters of St. Joseph.

The facts are not in dispute and it is apparent that title to the equipment in question remained in Acrow and Dell respectively, that it was for the most part delivered to the job by the Di Cecco Company and was always returned by that company or its trustees in bankruptcy after use. All of the equipment in question was furnished to the Di Cecco Company on a straight rental basis and no personnel of either Acrow or Dell were employed in connection with its installation or employment.

[1] [1962] O.R. 748, 33 D.L.R. (2d) 701.

1963

CLARKSON CO. LTD. *et al.* v. ACE LUMBER LTD. *et al.*

Ritchie J.

The determination of this appeal depends upon the true construction to be placed upon s. 5 of *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, and specifically upon whether that section is to be so construed as to create a lien in respect of the rentals charged for the said equipment by the two lien claimants.

The material provisions of s. 5 of *The Mechanics' Lien Act* read as follows:

> (1) Unless he signs an express agreement to the contrary . . . any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any . . . building . . . for any owner, contractor, or subcontractor, by virtue thereof has a lien for the price of the work, service or materials upon the estate or interest of the owner in the . . . building . . . and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are placed or furnished to be used, . . . and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, . . .
>
> (2) The lien given by subsection 1 attaches to the land as therein set out where the materials delivered to be used are incorporated into the buildings, . . . on the land, notwithstanding that the materials may not have been delivered in strict accordance with subsection 1.

It was submitted on behalf of the respondents in this Court as it had been in the Court of Appeal for Ontario that the price of the rental of the said equipment was the proper subject-matter of a lien within the meaning of this section on the ground that such rental constituted "the performance of a service" in respect of the constructing and erecting of the buildings in question, or alternatively, that it constituted the furnishing of materials used in the construction and erection thereof.

All the judges of the Court of Appeal agreed with Roach J.A. that as the equipment here in question was neither furnished for the purpose of being incorporated nor incorporated into the finished structure of the buildings and as it was not consumed in the construction process, it could not be said to have been "material" furnished "to be used in the constructing or erecting of the building" within the meaning of the said s. 5. I agree with the reasoning and conclusion of Mr. Justice Roach in this regard. As that learned judge has also observed, the lien created by s. 5(1) in respect of "materials" furnished is a lien for the "price

of" such "materials". This is a different thing from the price of the rental of materials and it would appear to me that it would be illogical to suppose that the legislature intended to create a lien for the "price" of the materials themselves in favour of a person who never parted with title to them, who supplied them on the understanding that they would be returned and to whom they were in fact returned.

The respondents' contention that the rental of this equipment constituted the "performance of a service" within the meaning of the said s. 5 was however upheld by the Court of Appeal and Roach J.A., in the course of the reasons for judgment which he delivered on behalf of the majority of that Court, having expressed the view that the phrase "work or service" as employed in that section is disjunctive and that "the 'performance of service' must therefore mean the doing of something exclusive of 'work' or the placing or furnishing of materials to be used etcetera that enhances the value of the land", went on to say that:

> The words "performance of service" may not be the most apt words that the legislature could have used to express its intention, but in the context in which they have been used I think their meaning is sufficiently plain. They must be given a meaning consistent with the spirit of the Act. In the context in which they have been used I interpret them as meaning to supply aid or an essential need in the construction process.

After observing that the employment of the form of equipment supplied by the lien claimants was essential to the modern type of construction involved in the contract in question and that until recent years the function performed by that equipment involved the fabrication of forms on the job, the labour and material for which had the protection and security of the Act, Mr. Justice Roach concluded that "those who supply the service under this modern technique are equally entitled to that protection and security". He then proceeded to quote the provisions of s. 4 of *The Interpretation Act*, R.S.O. 1960, c. 191, to the effect that "the law shall be considered as always speaking," etc. and to say:

> To deny to these appellants the same security under the Act as was given to those who applied the earlier technique in the construction industry would be wrong and quite contrary to the spirit and purpose of the Act. In this connection I adopt the language of Brown J. in *Johnson v. Starrett* (1914), 127 Minn. 138 at 142 citing *Schaghticoke Powder Co. v. Greenwich and Johnsville Ry. Co.*, 183 N.Y. 306 where he said ". . . in the construction of statutes their language must be adapted to changing conditions brought about by improved methods and the progress of the inventive arts".

1963

CLARKSON CO. LTD. *et al.* v. ACE LUMBER LTD. *et al.*

Ritchie J.

It appears to me that this latter argument loses much of its force when it is remembered that *The Mechanics' Lien Act* in question was revised by the Legislature of Ontario in the same year (1960) in which the equipment was rented. This is not a question of adapting the language of an old statute to meet new conditions, but rather one of determining the intention of the legislature with respect to a building practice which was currently employed at the time when the statute was enacted.

The above excerpts from the reasons for judgment of the majority of the Court of Appeal indicate to me that the conclusion there reached is predicated in large measure on the assumption that the provisions of *The Mechanics' Lien Act* which describe and delimit the classes of persons entitled to a lien thereunder are to be liberally construed and that their language is to be adapted to meet the circumstances here disclosed.

With the greatest respect, I am, however, of opinion that the proper approach to the interpretation of this statute is expressed in the dissenting opinion of Kelly J.A. where he says that:

> The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.

The same view was adopted in the unanimous opinion of the Supreme Court of Oregon in *Timber Structures v. C.W.S. Grinding & Machine Works*[1], where it was said:

> We agree with the defendant that the right to a lien is purely statutory and a claimant to such a lien must in the first instance, bring himself clearly within the terms of the statute. The statute is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the lien; but when the claimant's right has been clearly established, the law will be liberally interpreted toward accomplishing the purposes of its enactment.

[1] 229 P. 2d 623 at 629.

The words "perform" and "service" are both susceptible of a variety of meanings according to the context in which they are employed and as has been indicated, if the statutory language is liberally construed and selected meanings are assigned to each of these words in order that they may be adapted to the circumstances, it may then be logical to construe the phrase "any person who performs any . . . service upon or in respect of . . . constructing any building" as including a person who rents non-consumable equipment for temporary use to facilitate the building's construction. In my view, however, different considerations apply to the strict construction of a statute which creates a lien, on the one hand, for any person who "performs any work or service" and on the other hand for any person who "furnishes any material". Even if it were accepted that the presence of the equipment at the building site in itself constituted a "service upon or in respect of . . . constructing" the building it is nevertheless my view that the words "furnishes" and "performs" as they occur in s. 5 of the Act must be given separate meanings and that the latter word must be taken as connoting some active participation in the performance of the service on the part of the lien claimant. Having regard to the rule of construction, which I consider to be applicable under the circumstances, I do not think that by merely making their equipment available at a fixed rental, the respondents can be said to be persons who performed any service upon or in respect of the building within the meaning of the section.

None of the cases so thoroughly analyzed in the Court of Appeal appears to me to constitute any direct authority for the proposition that the provisions of s. 5 of the Act or any equivalent statutory provisions create a lien for "services" in respect of the furnishing of equipment alone on a straight rental basis as in the present case. On the other hand, in the case of *Crowell Bros. Ltd. v. Maritime Minerals Ltd. et al.*[1], the Supreme Court of Nova Scotia, construing statutory language which was substantially the same as that with which we are here concerned, concluded that no lien under the heading of service could arise for the rental of a drill sharpener employed in sharpening tools used in

[1] (1940), 15 M.P.R. 39, 2 D.L.R. 472.

1963

CLARKSON CO. LTD. *et al.* v. ACE LUMBER LTD. *et al.*

Ritchie J.

the actual making of a mine. It appears to me that Doull J., who rendered the decision of that Court, was correct in adopting the view that:

> ...unless expressly so provided by statute, no lien can be acquired for the value or use of tools, machinery or appliances furnished or loaned for the purpose of facilitating the work where they remain the property of the contractor and are not consumed in their use but remain capable of use in some other construction or improvement work.

It is true that this language was adopted by Mr. Justice Doull from the resumé of American cases contained in Corpus Juris, vol. 40 at p. 86, but it seems to me to have been well applied to the statute which he had before him and that it applies with equal force to the *Mechanics' Lien Act* of Ontario.

As has been indicated, the practice of renting construction equipment appears to have been current in the construction business at the time when *The Mechanics' Lien Act,* R.S.O. 1960, c. 233, was enacted and it seems to me that as the legislature at that time made no express provision for the inclusion of the renters of such equipment amongst those persons entitled to a mechanics' lien, it does not now lie with the Courts to create such a lien by adapting the statutory language that was used so as to accomplish that purpose.

For these reasons, as well as for those contained in the dissenting opinion of Kelly J.A., I would allow this appeal, set aside the order of the Court of Appeal for Ontario and direct that the report of the learned master from which the appeal was taken to that Court be restored.

The appellants will have the costs of this appeal and of the appeal to the Court of Appeal for Ontario.

Appeal allowed, order of the Court of Appeal for Ontario set aside and report of the Master restored.

Solicitors for the appellant, The Clarkson Co. Ltd.: Aylesworth, Garden, Thompson & Denison, Toronto.

Solicitors for the appellants, The Sisters of St. Joseph: T. A. King, Toronto.

Solicitors for the respondent, Acrow (Canada) Ltd.: White, Bristol, Beck & Phipps, Toronto.

Solicitors for the respondent, Dell Construction Co. Ltd.: Lorenzetti, Mariani & Wolfe, Toronto.

WILLIAM BYERS (*Plaintiff*) ..... APPELLANT;

AND

RENE BOURBONNAIS (*Defendant*) .... RESPONDENT.

1962

*Oct. 30

Nov. 30

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Motor vehicle—Collision at unprotected intersection—Right-of-way—Passenger injured—Liability—Failure to respect right-of-way sole cause of collision.

The plaintiff was injured when a car in which he was a passenger collided with a car owned by the defendant and driven by his son. The car in which the plaintiff was a passenger was travelling in a southerly direction and the defendant's car was travelling in an easterly direction. The collision occurred in the City of Montreal at the southwest portion of an unprotected intersection. Speed was not a determining cause of the accident. The trial judge maintained the action against the defendant. This judgment was reversed by the Court of Queen's Bench. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Pursuant to s. 83 of By-law No. 1319 of the City of Montreal, which applies to this case, the driver of the car in which the plaintiff was a passenger had to give the right-of-way to the other car and his failure to do so was the sole determining cause of the collision.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Tellier J. Appeal dismissed.

Clarence Fiske and *Charles Emery,* for the plaintiff, appellant.

Jean Badeaux, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le 15 août 1957, dans la cité de Montréal, vers 6:15 heures p.m., l'appelant Byers était passager dans une automobile appartenant à l'un des défendeurs Jean Desmarchais, et conduite par Paul Desmarchais. Cette voiture se dirigeait dans une direction nord-sud sur la rue Fulford et, en arrivant à l'intersection de la rue Workman, elle vint en collision avec celle de René Bourbonnais et conduite par son fils mineur Roland Bourbonnais.

Byers subit des dommages sérieux et institua une action au montant de $45,274.14 contre Paul Desmarchais, Jean Desmarchais et René Bourbonnais, ce dernier tant personnellement qu'en sa qualité de tuteur à son enfant mineur

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.

[1] [1962] Que. Q.B. 270.

1962

BYERS v. BOURBONNAIS

Taschereau J.

Roland Bourbonnais qui conduisait la voiture. Il a conclu à ce que les défendeurs soient condamnés conjointement et solidairement à payer le montant des dommages subis.

M. le Juge Edouard Tellier de la Cour supérieure a rejeté l'action du demandeur contre le défendeur Jean Desmarchais, mais l'a accueillie contre René Bourbonnais conjointement et solidairement en sa qualité de tuteur à son fils mineur Roland, et aussi personnellement. Le montant accordé en Cour supérieure a été de $19,274.14.

Le défendeur Bourbonnais a inscrit cette cause en appel devant la Cour du banc de la reine[1], tant personnellement qu'en sa qualité de tuteur à son enfant mineur, et son appel a été maintenu de sorte qu'il a été libéré de toute responsabilité comme conséquence de cet accident. Devant la présente Cour, l'appelant Byers demande de faire rétablir le jugement de la Cour supérieure de la province de Québec. En ce qui concerne Paul Desmarchais, le juge au procès, malgré qu'il reconnaisse la responsabilité de ce dernier, affirme avec raison qu'aucune condamnation ne peut être rendue contre lui parce que, devant la Cour supérieure, la cause n'a été inscrite sur le rôle que quant à Bourbonnais seulement. Il appert en outre que Paul Desmarchais, au cours de l'instance, a été déclaré en faillite.

La preuve révèle qu'à l'intersection des rues Fulford et Workman, il n'y a aucun signal d'arrêt; que le soir de cet accident, la voiture de Desmarchais circulait à environ 15 milles à l'heure, et qu'en s'approchant de l'intersection, Bourbonnais qui circulait à environ 25 milles à l'heure, a substantiellement réduit sa vitesse. Les deux voitures sont arrivées à l'intersection évidemment en même temps et la collision a eu lieu dans la partie sud-ouest des rues Fulford et Workman.

L'article 83 du règlement municipal n° 1319 de la Cité de Montréal, relativement à la circulation dans les limites de la ville, doit recevoir son application. Cet article est rédigé dans les termes suivants:

> Aux croisées non protégées, la personne qui conduit un véhicule sur une rue ou voie publique est tenue de céder le passage à la personne qui conduit un véhicule *qui vient à sa droite sur l'autre rue ou voie publique.*

[1] [1962] Que. Q.B. 270.

Il s'agissait là d'une croisée non protégée et, par conséquent, en vertu des termes mêmes du règlement, qu'on ne peut évidemment pas mettre de côté, Desmarchais qui a vu Bourbonnais venir à sa droite, devait lui céder le droit de passage.

Je crois que les deux conducteurs conduisaient à des vitesses raisonnables. A l'approche de l'intersection, il y eut de part et d'autre un moment d'hésitation, mais il appartenait alors à Desmarchais, conducteur bénévole de la voiture dans laquelle se trouvait Byers, de céder la route à Bourbonnais qui s'avançait à sa droite. Comme le dit M. le Juge Owen qui a écrit le jugement de la Cour, et je m'accorde avec lui,

> The evidence accepted by the learned trial judge is that Bourbonnais before he came to the intersection and before he applied the brakes was travelling at a speed of 25 m.p.h. In my opinion this is not a case where speed was a determining cause of the accident. On the evidence there is, in my opinion, no basis for holding that Bourbonnais abused his right of way.
>
> On the facts found by the learned trial judge I conclude that the sole determining cause of this accident was the negligence of Paul Desmarchais in failing to respect the right of way of the automobile driven by Roland Bourbonnais which was coming from Desmarchais' right.

J'en viens donc à la conclusion que le jugement de la Cour du banc de la reine est bien fondé et qu'il n'y a pas lieu pour cette Cour d'intervenir.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Hackett, Mulvena, Drummond & Fiske, Montreal.

Attorneys for the defendant, respondent: Filion, Badeaux & Beland, Montreal.

1962

*Oct. 22, 23
Dec. 17

LES PETROLES INC. (*Defendant*) .....APPELLANT;

AND

DAME LORENZO TREMBLAY *ET AL.* (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contracts—Letting and hiring—Lease of public garage—Misrepresentation as to earnings—Action in annulment—Whether fraud—Whether ratification of contract—Civil Code, arts. 993, 1530.

During the course of the negotiations which led to the signing of a lease of a public garage, the defendant lessor represented to the plaintiff that the average annual gross earnings of the garage were $350,000 and that the annual profits varied between $20,000 and $25,000. Some seven months later the lessee learned that in fact the garage had shown a loss in each of the previous six years. The lessee instituted this action in annulment on the ground of false representation. The defense pleaded that the representations, if they had been made, were not fraudulent and that in any event the lessee had ratified the contract. The trial judge dismissed the action. This judgment was reversed by the Court of Queen's Bench. The lessor appealed to this Court.

Held: The lessee was entitled to annulment of the lease.

The representations which had induced the signing of the lease justified the granting of the annulment. Ratification is never to be presumed. The lessee realized only gradually that he had been defrauded. Once it was established that the lessee had been induced by false representation to sign the lease, the onus was on the defendant to prove ratification. In the circumstances of this case that onus was not discharged. *Lortie v. Bouchard,* [1952] 1 S.C.R. 508, referred to.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Edge J. Appeal dismissed.

Pierre Coté, for the defendant, appellant.

Jean Turgeon, Q.C., and *I. Simard, Q.C.,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—En juin 1957 l'appelante opérait à Québec depuis plusieurs années, un établissement commercial consistant en un garage, un débit d'essence et un entrepôt de remisage d'automobiles. C'était une exploitation d'assez grande importance.

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Martland JJ.

[1] [1961] Que. Q.B. 856.

Un nommé Lorenzo Tremblay (demandeur, décédé pendant l'instance et maintenant représenté par les intimés comme exécuteurs testamentaires) apprit par les journaux que l'appelante désirait louer cette exploitation dont elle était propriétaire. Il entra en pourparlers avec l'appelante représentée par un préposé du nom de Lefrançois. Ce dernier lui représenta que la moyenne annuelle du volume d'affaires était de $350,000 et que les profits annuels variaient entre $20,000 et $25,000. Toutefois, en dépit de la requête de l'intimé, Lefrançois ne put lui exhiber les livres de comptabilité ni lui fournir de bilan, donnant comme raison que les livres avaient été détruits au cours d'un incendie et que, par ailleurs, tous les renseignements étaient intégrés dans la comptabilité générale de l'appelante et qu'il n'était pas possible d'y avoir accès.

Tremblay se fia aux représentations de Lefrançois et le 26 juin 1957 il signa avec l'appelante un bail pour une période d'un an au montant de $30,000 payable par mensualités de $2,500. En plus, le 28 juin 1957 il consentit une hypothèque continue pour garantir ses paiements futurs.

Après avoir pris possession de l'établissement le 1er juillet 1957, Tremblay réalisa graduellement que les faits qu'on lui avait représentés paraissaient être loin de la vérité, mais pour s'en assurer davantage il exploita le commerce jusqu'au début de février 1958.

A une date que la preuve ne précise pas, mais qui serait vers janvier 1958, Tremblay apprit que Lefrançois lui avait caché un fait essentiel, à savoir que l'exploitation avait été déficitaire pendant les six dernières années, et par l'entremise de son avocat, il en avisa l'appelante par lettre le 24 janvier 1958.

Au début de mars 1958 Tremblay intenta la présente action en résiliation des contrats ci-dessus mentionnés pour cause de dol et de fausses représentations.

L'appelante a plaidé, en substance, que si les représentations ci-dessus avaient été faites, elles devaient recevoir le sens «d'une simple possibilité de revenus futurs». Elle ajouta que par ses agissements l'intimé avait ratifié le contrat et qu'il s'était plaint tardivement.

La défense fut maintenue par la cour de première instance, qui statua que l'appelante avait simplement exalté la valeur du commerce, qu'elle n'avait employé aucun

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LES PETROLES INC. v. TREMBLAY et al.

Abbott J.

moyen coupable, car «une réticence, même par le silence, n'équivaut pas à l'idée qu'éveille l'expression de manœuvre». La Cour, de plus, a accueilli la défense fondée sur l'acquiescement au contrat.

L'appel des intimés fut maintenu par un jugement majoritaire[1], les juges Bissonnette et Badeaux dissidents. Le bail et l'acte d'hypothèque ont été annulés et l'appelante a été condamnée à payer au demandeur une somme de $7,420.59. Le juge Bissonnette était d'avis qu'il y a eu dol de la part du préposé de l'appelante, mais qu'il y a eu aussi ratification et acquiescement de la part de feu Lorenzo Tremblay. Le juge Badeaux était aussi d'avis que par ses actes et agissements Tremblay a confirmé le contrat.

Les deux questions en litige dans le présent appel sont les suivantes:

1. Y a-t-il eu dol de la part de l'appelante?
2. En dépit du dol, feu Lorenzo Tremblay a-t-il ratifié le contrat?

La Cour d'Appel a décidé que Tremblay n'aurait jamais signé le bail et l'hypothèque ci-dessus relatés, s'il avait su que l'appelante n'avait pu opérer le garage avec profit pendant les six ou sept années précédentes, et que les représentations faites par Lefrançois justifiaient la demande de la résiliation du contrat par Tremblay.

Je suis d'avis que la preuve confirme cette conclusion qui ne doit pas être renversée.

Il reste la question de ratification. Tel qu'indiqué par M. le Juge Hyde dans la Cour du banc de la reine, il est important de reconnaître que cette action n'est pas une action rédhibitoire soumise à la disposition de l'art. 1530 du *Code Civil*, et cette distinction est discutée par mon collègue, M. le Juge Taschereau, dans la cause de *Lortie v. Bouchard*[2], où il dit:

> Je ne crois pas qu'il y ait eu acceptation de l'état de choses par le demandeur, ni que son action soit tardive. Il est entendu, et la jurisprudence reconnaît bien le principe que lorsqu'il s'agit d'une demande en annulation de contrat pour vices cachés de la chose, l'article 1530 C.C. doit trouver son application, et l'action doit nécessairement être instituée *avec diligence raisonnable*. Mais la règle a moins de rigueur quand il s'agit de fausses représentations, et la même célérité n'est pas une condition essentielle à la réussite de l'action.

[1] [1961] Que. Q.B. 856.
[2] [1952] 1 S.C.R. 508 at 518.

Ce n'est que graduellement que Tremblay a réalisé qu'il avait été trompé par le préposé de l'appelante. D'après la preuve, c'est au cours de janvier 1958 que Tremblay a su pour la première fois que les opérations du garage avaient été déficitaires au cours des six années qui précédèrent la signature de son bail. Il est vrai que dans le mois d'octobre Tremblay s'est rendu compte qu'il était incapable de conduire son entreprise avec profit. Il a consulté son avocat qui lui a conseillé de tâcher d'améliorer l'efficacité de son opération. C'est à cette époque qu'il a discuté de l'affaire avec le gérant-général de l'appelante et que celui-ci l'a assuré qu'avec une administration plus efficace il pourrait opérer avec profit.

La ratification ne se présume jamais et nul n'est présumé renoncer à un droit. Aussitôt qu'il a été établi que Tremblay avait été induit à signer le contrat comme conséquence des fausses représentations faites par le préposé de l'appelante, le fardeau de la preuve reposait sur l'appelante d'établir telle ratification. Dans les circonstances que la preuve révèle, je partage l'opinion exprimée par la majorité de la Cour du banc de la reine que l'appelante n'a pas établi sa défense de ratification et d'acquiescement.

A l'audience la question fut soulevée par la Cour, concernant sa juridiction d'entendre l'appel. Dans son action, Tremblay réclamait des montants s'élevant à un total de $14,231.97. Le jugement de la Cour du banc de la reine lui a alloué $7,420.59, mais en tenant compte d'une somme de $4,269.41 dont Tremblay était redevable à l'appelante ce montant a été déduit par la Cour. Dans les circonstances, l'appelante a fait une motion à cette Cour pour une permission spéciale d'appeler, et cette motion a été accordée sans frais.

Pour les raisons que je viens de donner, aussi bien que pour celles de M. le Juge Hyde, avec qui je suis d'accord, l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Pratte, Coté, Tremblay & Déchêne, Quebec.

Attorney for the plaintiff, respondent: I. Simard, Quebec.

1962
*Dec. 6
1963
Jan. 22

HER MAJESTY THE QUEEN .....APPELLANT;

AND

SEITALI KERIM .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Hall leased for bingo games—Owner's president on premises when games played—No participation in games by president—Refreshment stand and commissionaire provided by company—Whether president was "one who keeps a common gaming house"—Criminal Code, 1953-54 (Can.), c. 51, s. 176.

A company, of which the respondent was president, owned an hotel and was licensed to carry on the business of a public hall. The company leased its hall on four successive nights of each week to four different charitable organizations, which conducted bingo games, the proceeds of which were used for charitable purposes. These organizations, in each case, made their own arrangements for the conduct of the games, supplying their own equipment and personnel for that purpose. They paid to the company a standard rental per night for the use of the hall, which was not in any way dependent upon the number of persons who played in the games. The respondent was on the premises each evening, but did not participate in any way in the games. The company employed a commissionaire and operated a refreshment stand. The respondent was convicted on a charge of keeping a common gaming house contrary to s. 176(1) of the *Criminal Code*, but this conviction was quashed by a majority decision of the Court of Appeal. The Crown appealed to this Court.

Held (Kerwin C.J. and Taschereau J. dissenting): The appeal should be dismissed.

Per Cartwright, Martland and Ritchie JJ.: In order to constitute the offence of keeping a common gaming house, there must be something more than the keeping of a place whose use, by someone other than the accused, makes it a common gaming house. The position of a "keeper" who does not in any way participate in the operation of the games played, but who knows that the place in question is being used for that purpose, and who permits such use, is that which was contemplated when the lesser offence defined in s. 176(2)(*b*) was created. That offence must have been created because it was not contemplated that such a person was, himself, keeping the common gaming house within the meaning of s. 176(1).

The offence defined in s. 176(1) involves some act of participation in the wrongful use of the place and the evidence in the instant case did not establish any such participation on the part of the respondent.

Per Kerwin C.J. and Taschereau J., *dissenting:* By subs. (1)(*h*)(ii) of s. 168 of the Code, wherein "keeper" is defined, the respondent was a person who "assists or acts on behalf of an owner or occupier of a place" or at least "appears" to do so. The fact that by subs. (2)(*b*) of s. 176 everyone who, as agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting

*PRESENT: Kerwin C.J., Taschereau, Cartwright, Martland and Ritchie JJ.

house is guilty of an offence *punishable on summary conviction* could not by itself restrict the broad meaning given by Parliament to the word "keeper" in s. 168. A person who falls within the definition of a "keeper", "keeps" a "common gaming house" within s. 176(1).

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a conviction for keeping a common gaming house. Appeal dismissed, Kerwin C.J. and Taschereau J. dissenting.

J. W. Austin, for the appellant.

P. B. C. Pepper, Q.C., for the respondent.

The judgment of Kerwin C.J. and of Taschereau J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This appeal is concerned with the proper interpretation of portions of s. 168 and s. 176 of the *Criminal Code:*

168. (1) In this Part,

* * *

(*d*) "common gaming house" means a place that is
(i) kept for gain to which persons resort for the purpose of playing games; or
(ii) kept or used for the purpose of playing games

* * *

(C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

* * *

(*h*) "keeper" includes a person who
(i) is an owner or occupier of a place,
(ii) assists or acts on behalf of an owner or occupier of a place,
(iii) appears to be, or to assist or act on behalf of an owner or occupier of a place,
(iv) has the care or management of a place, or
(v) uses a place permanently or temporarily, with or without the consent of the owner or occupier; and

(*i*) "place" includes any place, whether or not
(i) it is covered or enclosed,
(ii) it is used permanently or temporarily, or
(iii) any person has an exclusive right of user with respect to it.

(2) A place is not a common gaming house within the meaning of subparagraph (i) or clause (B) or (C) of subparagraph (ii) of paragraph (*d*) of subsection (1)

* * *

[1] (1962), 38 C.R. 71, 132 C.C.C. 186.

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Kerwin C.J.

(b) while occasionally it is used by charitable or religious organizations for the purpose of playing games for which a direct fee is charged to persons for the right or privilege of playing, if the proceeds from the games are to be used for a charitable or religious object.

(3) The onus of proving that, by virtue of subsection (2), a place is not a common gaming house is on the accused.

* * *

176. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every one who

(a) is found, without lawful excuse, in a common gaming house, or common betting house, or

(b) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house,

is guilty of an offence punishable on summary conviction.

The respondent was convicted by a magistrate, in the Province of Ontario, on a charge that in 1959 and 1960 he, in the Municipality of Metropolitan Toronto, in the County of York, unlawfully did keep a common gaming house situate and known as the Club Kingsway, contrary to the *Criminal Code*. On appeal to the Court of Appeal for Ontario[1] the conviction was set aside, MacKay J.A. dissenting.

Kerim Brothers Limited was the registered owner of a lot and of a building thereon in which it carried on business as proprietor of an hotel known as the Kingsway Hotel. That company was licensed by the Metropolitan Licensing Commission. The company operated on the premises a club, known as The Kingsway, and the building was used for a number of purposes including dancing, banquets, receptions and displays. During the period in question the company leased its hall on four successive nights of each week to four different religious and charitable organizations which conducted bingo games, the proceeds of which were used for charitable purposes. These various organizations supplied their own equipment and personnel for the bingo games and paid to the company a standard rental for the use of the hall irrespective of the number of persons who played the games. The respondent was the president of the company and while he did not participate in the bingo games, the

[1] (1962), 38 C.R. 71, 132 C.C.C. 186.

fees were paid either in cash or by cheque to him or to one Buckingham. The cheques were not made payable to either of these men.

Undoubtedly the charge was laid under subs. (1) of s. 176 of the *Criminal Code*, which is in Part V of the Code and by subs. (1)(*d*) of s. 168, which is in the same Part and which might be repeated:

> 168. (1) In this Part,
>
> * * *
>
> (*d*) "common gaming house" means a place that is
>
> (i) kept for gain to which persons resort for the purpose of playing games; or
>
> (ii) kept or used for the purpose of playing games
>
> * * *
>
> (C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

Subsection (2), which might also be repeated, reads as follows:

> (2) A place is not a common gaming house within the meaning of subparagraph (i) or clause (B) or (C) of subparagraph (ii) of paragraph (*d*) of subsection (1)
>
> * * *
>
> (*b*) while occasionally it is used by charitable or religious organizations for the purpose of playing games for which a direct fee is charged to persons for the right or privilege of playing, if the proceeds from the games are to be used for a charitable or religious object.

There can be no question that the premises were used as a common gaming house as defined, and no point is made that the organizations which conducted the games of bingo fell within subs. 2(*b*). By subs. (1)(*h*)(ii) of s. 168, the respondent is a person who "assists or acts on behalf of an owner or occupier of a place" or at least "appears" to do so. The fact that by subs. 2(*b*) of s. 176 everyone who, as agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house is guilty of an offence punishable on summary conviction cannot by itself restrict the broad meaning given by Parliament to the word "keeper" in s. 168. There are many examples where the Crown may proceed summarily or by indictment.

I can come to no conclusion other than that when Parliament widened the definition of a "keeper", a person who falls within that definition "keeps" a "common gaming

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Kerwin C.J.

house" within s. 176(1). If a tenant of a house operates it as a common gaming house, without the knowledge of the owner, the latter cannot be said to "knowingly" permit a place to be let or used for the purposes of a common gaming house or a common betting house.

I would allow the appeal, set aside the order of the Court of Appeal and restore the conviction.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—The respondent was charged with keeping a common gaming house, contrary to the provisions of subs. (1) of s. 176 of the *Criminal Code*. The facts, which are not in dispute, are as follows:

Kerim Brothers Limited (hereinafter referred to as "the company") for some years has been the registered owner of the Kingsway Hotel, in Metropolitan Toronto. The company was licensed to carry on the business of a public hall and to sell refreshments and cigarettes. The premises have, on occasion, been used for dances, banquets, receptions, business displays and other purposes. From about February of 1959 to June of 1961 the company leased its hall, on four successive nights of each week, to four different religious and charitable organizations, which conducted bingo games, the proceeds of which were used for charitable purposes.

These organizations, in each case, made their own arrangements for the conduct of the games, supplying their own equipment and personnel for that purpose. They paid to the company a standard rental per night for the use of the hall, which was not in any way dependent upon the number of persons who played in the games.

The respondent was the president of the company and was on the premises each evening, but he did not, himself, participate in any way in the bingo games. The company did employ a commissionaire and it operated a soft drinks refreshment stand.

The respondent was convicted of the offence charged, but the conviction was quashed by a majority decision of the Court of Appeal of Ontario[1]. From that decision the Crown has now appealed.

[1] (1962), 38 C.R. 71, 132 C.C.C. 186.

The relevant sections of the *Criminal Code* are the following:

168. (1) In this Part,

* * *

(*d*) "common gaming house" means a place that is

(i) kept for gain to which persons resort for the purpose of playing games; or

(ii) kept or used for the purpose of playing games

* * *

(C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

* * *

(*h*) "keeper" includes a person who

(i) is an owner or occupier of a place,

(ii) assists or acts on behalf of an owner or occupier of a place,

(iii) appears to be, or to assist or act on behalf of an owner or occupier of a place,

(iv) has the care or management of a place, or

(v) uses a place permanently or temporarily, with or without the consent of the owner or occupier; and

(*i*) "place" includes any place, whether or not

(i) it is covered or enclosed,

(ii) it is used permanently or temporarily, or

(iii) any person has an exclusive right of user with respect to it.

* * *

176. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every one who

(*a*) is found, without lawful excuse, in a common gaming house or common betting house, or

(*b*) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house,

is guilty of an offence punishable on summary conviction.

As previously mentioned, the charge was laid under subs. (1) of s. 176 and the question in issue is whether, upon these facts, the respondent was "one who keeps a common gaming house".

The submission of the Crown is that the respondent, on these facts, was a "keeper", within the definition of that word, that the hall was a "common gaming house", within the definition of that term, and that, therefore, the respondent was "one who keeps a common gaming house", within s. 176(1).

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Martland J.

The position of the respondent is that a person who is a keeper, within the definition, is not necessarily one who keeps a common gaming house, within the meaning of s. 176(1), and this contention is supported on the ground that the word "keeper" is not used in that subsection and that specific provision was made in subs. (2)(*b*) for a lesser offence, punishable on summary conviction, in respect of classes of persons a member of which would fall within the definition of a keeper, who "knowingly permits a place to be let or used for the purposes of a common gaming house". It is argued that if a keeper, within the definition, is automatically guilty of an offence under subs. (1), because the place of which he is a keeper is used by others as a common gaming house, then there was no need to create the lesser offence, defined in subs. (2)(*b*).

On the facts, it would appear that the respondent fell within the definition of a keeper. It also appears that persons resorted to the premises in question for the purpose of playing games and that the premises were used for that purpose, so as to constitute them a common gaming house within the definition.

The definition of a keeper in s. 168(1)(*h*) is a very broad one and it relates to the keeper of a "place", which is also broadly defined. Every householder and, indeed, every landowner is a keeper within that definition. But this, of course, in itself, constitutes no offence. The offence defined in s. 176(1) is the keeping of a common gaming house. The question is, if the "place" is used in a manner which constitutes it a common gaming house, does everyone who falls within the definition of a keeper of that place automatically keep the common gaming house? In my opinion that conclusion does not follow. The offence is the keeping of the common gaming house, and, in my opinion, in order to constitute that offence, there must be something more than the keeping of a place whose use, by someone other than the accused, makes it a common gaming house. I do not, for example, see how the owner of a house leased to a tenant, who, without his knowledge, operates it as a common gaming house, could possibly be found guilty of the offence. What then is the position of a "keeper" who does not in any way participate in the operation of the games played, but who knows that the place in question is being used for

that purpose, and who permits such use? This, it appears to me, is the sort of situation which was contemplated when the offence defined in s. 176(2)(*b*) was created and, in my opinion, that offence must have been created because it was not contemplated that such a person was, himself, keeping the common gaming house within the meaning of s. 176(1).

I agree with the conclusion reached by Laidlaw J.A., in the Court below, that the offence defined in s. 176(1) involves some act of participation in the wrongful use of the place and that the evidence in this case does not establish any such participation on the part of the respondent.

For these reasons, in my opinion, the appeal should be dismissed.

Appeal dismissed, KERWIN C.J. *and* TASCHEREAU J. *dissenting.*

Solicitor for the Attorney-General of Ontario: W. C. Bowman, Toronto.

Solicitors for the respondent: Willis & Dingwall, Toronto.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

HOLLINGER NORTH SHORE EXPLORATION COMPANY, LIMITED RESPONDENT.

1962
*Dec. 3, 4

1963
Jan. 22

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Exemption for new mines—Mine operated by sub-lessee—Whether royalties paid to lessee by sub-lessee on ore shipped from leased mine exempt as "income derived from the operation of a mine" within meaning of s. 83(5) of the Income Tax Act, R.S.C. 1952, c. 148, as enacted by 1955 (Can.), c. 54, s. 21(1).

Section 83(5) of the *Income Tax Act* provides that income derived from the operation of a mine during the period of 36 months commencing with the day on which the mine came into production is not to be included in computing the income of a corporation.

In 1953, the respondent company was granted a licence in the form of a lease on a large iron ore property in northern Quebec. It then granted to I Co., by sub-lease, part of the ore located on the property with the right to mine it. I Co. agreed to pay the respondent a royalty on all ore shipped. I Co. also undertook to mine for the respondent the

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Ritchie JJ.

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MINISTER OF NATIONAL REVENUE v. HOLLINGER NORTH SHORE EXPLORATION CO.

ore from the property which the latter had retained. What followed was a single uniform operation whereby ore was extracted from a single mine, transported and sold. In 1956 (well within the 36 months mentioned in s. 83(5)), the respondent received over $3 million from I Co. as royalties under the sub-lease, in addition to the proceeds of the sale of its share of the ore, which proceeds were conceded to be tax-exempt. The Minister argued that the royalties were not tax-exempt since the mine was not being operated by the respondent and that the source to the respondent of the royalties was the property right for which they were payable and not the operation of a mine. The Exchequer Court ruled in favour of the respondent. The Minister appealed to this Court.

Held: The appeal should be dismissed.

The royalties were exempt from tax as income "derived from the operation of a mine" within the meaning of s. 83(5) of the Act. The word "derived" in the context of the section is broader than "received" and is equivalent to "arising or accruing"; the expression is not limited to income arising or accruing from the operation of a mine by a particular taxpayer.

The mine was operated as a unit by the respondent and I Co. as a joint venture for their joint benefit, and the ore in place represented a capital investment of both companies. A return on that capital could be realized only through the operation of the mine, and, in the circumstances here, such operation was the source of the respondent's income within the meaning of s. 83(5), whether that income came from the extraction and sale of its own ore or from the royalties paid to it with respect to the remainder of the ore belonging to I Co.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], reversing a ruling of the Minister of National Revenue. Appeal dismissed.

Paul Ollivier, for the appellant.

H. H. Stikeman, Q.C., C. G. Cowan, P. N. Thorsteinsson and *D. J. Johnston,* for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from a judgment of Thurlow J. of the Exchequer Court of Canada[1], allowing respondent's appeal from assessment of income tax for the year 1956. The sole question at issue is whether respondent is entitled to claim exemption from taxation with respect to a sum of $3,182,936.93, as being income derived from the operation of a mine, within the meaning of s. 83(5) of the *Income Tax Act,* R.S.C. 1952, c. 148, enacted by 3-4 Eliz. II, c. 54, which reads:

83. (5) Subject to prescribed conditions, there shall not be included in computing the income of a corporation income derived from the operation of a mine during the period of 36 months commencing with the day on which the mine came into production.

[1] [1960] Ex. C.R. 325.

The material facts are not in dispute. The respondent is a corporation organized under *The Quebec Mining Companies' Act* and from 1943 to 1949 expended substantial amounts in exploration work and diamond drilling to prove up certain iron ore deposits in the province of Quebec.

In February 1953, under appropriate legislative authority, respondent was granted by the Crown an "operating licence in the form of a lease" by which it obtained, *inter alia,* the right to mine and take iron ore from a tract of land in the northern part of the province.

After obtaining this licence respondent, by what is referred to as a sublease, granted to Iron Ore Company of Canada certain proportions of the iron ore located on the said tract of land, with the right to mine and carry away the ore so granted. The consideration for this grant, as set out in the sublease, consisted of (a) a payment of $100,000 per year to be made to the Province of Quebec, (b) the sublessee's share of the duties payable under the Quebec Mining Act, and (c)

an overriding royalty on all iron ore and specialties shipped by the Sublessee under this Sublease from any mines upon the described lands (except iron ore and specialties shipped for the account of the Sublessor) and sold and delivered each year by the Sublessee, of seven per cent of the then competitive market price f.o.b. vessels at Seven Islands, Quebec (determined as provided in Section 2 of the Mutual Covenants of this Sublease) for each grade and kind of such iron ore and specialties, which the Sublessee binds itself to pay to the sublessor during the term hereof; provided however, that, in the event seven per cent of such competitive market price for any grade or kind of such iron ore or specialties shall be less than twenty-five cents a ton, then the overriding royalty on such iron ore and specialties shall be twenty-five cents a ton.

The contract also provided that, beginning with the year 1955, Iron Ore Company of Canada should pay royalty based on a certain minimum tonnage of iron ore per year, but counsel for appellant stated that this provision has no bearing on the present appeal.

In December 1949, Iron Ore Company of Canada entered into a management contract with Hollinger-Hanna Limited, whereby the latter undertook to provide management services and supervision of the operations and properties of Iron Ore Company of Canada.

In June 1954, the respondent made a similar contract with Hollinger-Hanna Limited for the management of the respondent's iron ore operations and properties not subleased to Iron Ore Company of Canada.

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MINISTER OF NATIONAL REVENUE v. HOLLINGER NORTH SHORE EXPLORATION CO.

Abbott J.

In March 1955, the respondent made a further contract with Iron Ore Company of Canada whereby the latter undertook to mine for the respondent iron ore from the retained undivided interest of the respondent which had not been subleased to Iron Ore Company of Canada.

What followed was a single uniform operation whereby iron ore was extracted from a single mine, transported to Sept-Iles, Quebec, and sold. The sale price of the ore was received by the management company, Hollinger-Hanna Limited, which after deducting its charges, remitted to the respondent the amount representing the proceeds of sale of its share of the ore. The appellant concedes that this sum is not to be included in the respondent's income for the 1956 taxation year by virtue of the provisions of section 83(5) of the *Income Tax Act*.

Hollinger-Hanna Limited also paid to Iron Ore Company of Canada the amount representing the proceeds of sale of the latter's share of the iron ore and from this amount Iron Ore Company of Canada then paid to the respondent the overriding royalty payable under the sublease, which in 1956 amounted to $3,182,936.93. The appellant included this amount in computing respondent's income for the year 1956, although it is common ground that the whole of that year was within the period of 36 months after the mine came into production.

Shortly stated, appellant's position is (1) that the expression "income derived from the operation of a mine" in s. 83(5) refers to income from a particular source namely the operation of a mine, (2) that the operation of a mine being a business, the income exempted from taxation is the profit from such business received by the particular corporation claiming the exemption, and (3) that the source to respondent of the income in issue here was merely the property right for which royalty was payable and not the operation of a mine.

I share the view expressed by the learned trial judge that the ordinary meaning of the words "derived from the operation of a mine" is broader than that contended for by appellant, that the word "derived" in this context is broader than "received" and is equivalent to "arising or accruing" (vide

Commissioner of Taxation v. Kirk[1]) and that the expression is not limited to income arising or accruing from the operation of a mine by a particular taxpayer.

The mine in question was operated as a unit by respondent and Iron Ore Company of Canada as a joint venture for their joint benefit, and the ore in place represented a capital investment of both companies. A return on that capital investment could be realized only through the operation of the mine, and in the circumstances here, in my opinion, such operation was the source of respondent's income within the meaning of s. 83(5), whether that income came from the extraction and sale of its own ore or from the royalty paid to it with respect to the remainder of the ore belonging to the Iron Ore Company of Canada.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Holden, Murdoch, Walton, Finlay, Robinson & Pepall, Toronto.

[1] [1900] A.C. 588 at 592.

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*Dec. 11, 12, 13
1963
Jan. 22

COMPOSERS AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

INTERNATIONAL GOOD MUSIC, INC., (formerly KVOS INC.), ROGAN PROPERTIES LTD. (formerly KVOS (CANADA) LTD.), LAFAYETTE ROGAN JONES AND GORDON MUNRO REID (*Defendants*) .....RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Practice—Exchequer Court—Copyright—Infringement—Notice of statement of claim—Order for service out of jurisdiction—Material required in affidavit in support of application—Whether proper case for order for service ex juris—Exchequer Court Act, R.S.C. 1952, c. 98, s. 75(1)—Rr. 42, 76—English Order XI Rr. 1, 4.

The plaintiff, who was the owner of the performing rights in Canada of certain musical works, brought an action for infringement of its copyright against four defendants, two of whom were located out of the jurisdiction of the Exchequer Court. The defendant KVOS Inc. operated a radio and television station in the State of Washington. It was alleged that this company had communicated, by radio communication of television programmes beamed at Canada, musical works within the repertoire of the plaintiff. It was also alleged that the company's president, the defendant J, had caused or authorized such communication. An order was made by Dumoulin J. permitting the plaintiff to serve a notice of statement of claim on each of the non-resident defendants. Subsequently, an application to set aside that order was granted by Thorson P. Pursuant to leave, the plaintiff appealed from the latter order.

Held: The appeal should be allowed.

The power to grant an order for service *ex juris* was given by s. 75(1) of the *Exchequer Court Act*, R.S.C. 1952, c. 98. The combined effect of that section and of Rules 76 and 42 of the Exchequer Court was to make applicable Order XI of the Supreme Court of Judicature in England. *Muzak Corporation v. Composers, Authors and Publishers Association of Canada Ltd.*, [1953] 2 S.C.R. 182, referred to.

The submission that Thorson P. was without jurisdiction to make the order setting aside the order for service *ex juris* was rejected. The application to the President was not an application for recission of, or an appeal from, the prior order, but was an application by a party, who had not appeared on the initial application, to set the order aside. The English practice which, pursuant to Rule 42 of the Rules of the Exchequer Court, would become applicable, is that such an order, obtained *ex parte*, can be set aside, upon the application of the defendant, after service.

The affidavit of the executive assistant to the general manager of the plaintiff in support of the plaintiff's application for an order *ex juris* stated the deponent's belief that the plaintiff had a good cause of action. It

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Ritchie JJ.

stated that to the best of his knowledge and belief the facts set out in the statement of claim were true. The facts stated in the statement of claim clearly showed where the two non-resident defendants were or might probably be found. Those two matters were all that was required by s. 75 of the Act and by Rule 76. In addition to those matters Rule 4 of Order XI required the affidavit to show whether or not the defendant was a British subject. However, under s. 75 of the Act, there was no necessity for a statement in the affidavit, in proceedings in the Exchequer Court, as to whether or not the defendant was a British subject. The final requirement of Rule 4 that the affidavit state the grounds on which the application is made was considered to have been met.

This was a proper case for an order for service *ex juris* within the requirements of the concluding words of Rule 4. The test to be applied was whether the plaintiff had "a good arguable case". On the basis of the allegations contained in the statement of claim and the other material which was before the President, the plaintiff had such a case.

APPEAL from an order of Thorson P. of the Exchequer Court of Canada[1], setting aside a prior order for service out of the jurisdiction. Appeal allowed.

M. B. K. Gordon, Q.C., and *J. J. Ellis*, for the plaintiff, appellant.

Cuthbert Scott, Q.C., and *G. S. Hugh-Jones*, for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal, pursuant to leave, from an order of the learned President of the Exchequer Court[1], setting aside a prior order, made by Dumoulin J., *ex parte*, giving leave to serve out of the jurisdiction two of the defendants in this action.

The action is against four defendants for infringement of the appellant's copyright in certain musical works. The statement of claim alleges that KVOS Inc. (which is now named "International Good Music, Inc." and which is hereinafter referred to as "the American company") was incorporated in the State of Washington, with its principal place of business in the town of Bellingham, in that State, and that KVOS (Canada) Ltd. (now named "Rogan Properties Ltd." and hereinafter referred to as "the Canadian company") is its subsidiary. The respondent Jones is stated to reside in Bellingham and to be a director of both companies. The respondent Reid is stated to reside in the City of Vancouver and to be the manager of the Canadian company. It

[1] (1962), 38 C.P.R. 237.

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Martland J.

is further alleged, *inter alia,* that the American company has communicated, by radio communication of television programmes beamed at Canada, and particularly at the Province of British Columbia, musical works within the repertoire of the appellant and that the respondent Jones has caused or authorized such communication.

The affidavit in support of the appellant's application for an order for service *ex juris* was that of John V. Mills, the executive assistant to the general manager of the appellant, and it read as follows:

> 1. That I am executive assistant to the General Manager of the plaintiff herein and as such have knowledge of the facts herein deposed to.
>
> 2. That I have read the statement of claim filed herein and can say of my own knowledge or alternatively as a result of enquiries I made personally of various people in the City of Vancouver, in the Province of British Columbia, including the British Columbia agent of the plaintiff herein and the defendant Gordon Munro Reid, that to the best of my knowledge and belief the facts set out in the statement of claim are true.
>
> 3. That I have been advised by Counsel for the plaintiff and do verily believe that the plaintiff has a good cause of action against all the defendants herein.

Upon this material the order for service *ex juris,* upon the American company and upon the respondent Jones, was made. Upon the application to set aside that order, there was filed an affidavit of the respondent Jones, of the City of Bellingham, in the State of Washington, in which he stated, *inter alia,* that he was the president of the American company, which was incorporated under the laws of the State of Washington, having its head office in the City of Bellingham, in that State, and which operated the business of a radio and television station in that State, the transmitter being situated on Orcas Island, in the State of Washington. In cross-examination on his affidavit, he acknowledged that he was responsible for the operation of that station. He also testified that the major part of the viewing and listening audience of programmes from that station, roughly 80 per cent, was in Canada.

Another affidavit was filed of the respondent Reid. He was also cross-examined on his affidavit and on this cross-examination there was filed, as an exhibit, an advertising brochure, paid for by the American company, which stated that the American company's transmitter was located 39 air miles from Vancouver and 30 air miles from Victoria. A map, which formed part of the brochure, showed the station

on Orcas Island and indicated that over 1,000,000 people in British Columbia were within its reach, and 300,000 in northwestern Washington.

The power to grant an order for service *ex juris* is given by s. 75(1) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which provides:

75. (1) When a defendant, whether a British subject or a foreigner, is out of the jurisdiction of the Exchequer Court and whether in Her Majesty's dominions or in a foreign country, the Court or a judge, upon application, supported by affidavit or other evidence, stating that, in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, may order that a notice of the information, petition of right, or statement of claim be served on the defendant in such place or country or within such limits as the Court or a judge thinks fit to direct.

Rules 76 and 42 of the Exchequer Court Rules provide as follows:

RULE 76

Service out of jurisdiction

When a defendant is out of the jurisdiction of the Court, then upon application, supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, the Court or a Judge may order that a notice of the information, petition of right, statement of claim or other judicial proceeding be served on the defendant in such place or country or within such limits as the Court or a Judge thinks fit to direct, and the order is, in such case, to limit a time (depending on the place of service) within which the defendant is to file his statement in defence, plea, answer or exception, or otherwise make his defence according to the practice applicable to the particular case, or obtain from the Court or a Judge further time to do so.

RULE 42

Practice and procedure not provided for by Statute or by these Rules

In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in Her Majesty's Supreme Court of Judicature in England.

In the case of *Muzak Corporation v. Composers, Authors and Publishers Association of Canada, Limited*[1], three of the five Judges who sat expressed the view that the combined effect of s. 75 of the *Exchequer Court Act* and of Rules 76 and 42, above cited, was to make applicable

[1] [1953] 2 S.C.R. 182, 19 C.P.R. 1.

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Order XI of the Supreme Court of Judicature in England. The other two members of the Court expressed no opinion on this point.

The relevant portions of Rules 1 and 4 of that Order are as follows:

1. Except in the case of a writ to which Rule 1A of this Order applies, service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever

* * *

(*ee*) The action is founded on a tort committed within the jurisdiction; or

* * *

4. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this Order.

Counsel for the appellant, at the outset, contended that the learned President was without jurisdiction to make the order setting aside the order for service *ex juris*. He submitted that after the order of Dumoulin J. had been made it must stand, unless it was rescinded by him pursuant to Rule 259 of the Rules of the Exchequer Court, or unless an appeal was successfully taken from it to this Court under s. 82 of the *Exchequer Court Act*.

I do not agree with this submission. The initial order was made by Dumoulin J., *ex parte*. The application to the learned President was not an application for rescission of, or an appeal from, that order, but was an application by a party, who had not appeared on the initial application, to set the order aside. The English practice which, pursuant to Rule 42, would become applicable is that such an order, obtained *ex parte*, can be set aside, upon the aplication of a defendant, after service. (See The Annual Practice, 1963, vol. I, p. 154.)

It, therefore, becomes necessary to consider the matter upon the merits. The learned President, in his reasons for setting aside the order, was of the opinion that the material in the affidavit in support of the order was plainly insufficient to enable the judge to whom the application was made to exercise his discretion to grant it. In his opinion, the

affidavit of Mills was inadequate, because it did not show in what place or country the American company and the respondent Jones were or probably might be found; that it did not state the facts which, if proved, would be a sufficient foundation for the action; and that it did not state any grounds for the application. He pointed out that the affidavit did not specify, except as to the respondent Reid, the source of Mills' information.

While the form of Mills' affidavit may be subject to some criticism, I would not be prepared to find that it was totally insufficient to warrant Dumoulin J. in making the order which he did. The affidavit states the deponent's belief that the appellant has a good cause of action. It states that to the best of his knowledge and belief the facts set out in the statement of claim are true. The facts stated in the statement of claim clearly show where the American company and the respondent Jones are or might probably be found.

Those two matters are all that is required by s. 75 of the Act and by Rule 76. In addition to those matters, Rule 4 of Order XI requires the affidavit to show whether or not the defendant is a British subject. This requirement arises because, under Rule 6 of Order XI, when the defendant is neither a British subject nor in the British Dominions, notice of the writ, and not the writ itself, is to be served upon him. However, s. 75 of the *Exchequer Court Act* begins with the words "When a defendant, whether a British subject or a foreigner, is out of the jurisdiction of the Exchequer Court . . ." and then it goes on to provide for service of a *notice* of the information, petition of right, or statement of claim. There is, therefore, no necessity for a statement in the affidavit, in proceedings in the Exchequer Court, as to whether or not the defendant is a British subject.

The final requirement of Rule 4 is that the affidavit state the grounds on which the application is made. When the affidavit in this case is read in conjunction with the statement of claim, it appears to me that it sufficiently alleges that the appellant's claim is that the respondents have committed a tort in Canada by the transmission of programmes, beamed at Canada, in which musical works, in respect of which the appellant had a copyright, were played.

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However, in any event, when there is added to what is contained in Mills' affidavit the affidavit of the respondent Jones, and the cross-examinations of the respondents Jones and Reid upon their respective affidavits, in my opinion, the formal requirements of Rule 4 have been met.

This does not end the matter, because the learned President was of the opinion that this was not a proper case for an order for service *ex juris* within the requirements of the concluding words of Rule 4. He considered that, on an examination of all of the material before him, there was nothing to indicate an infringement of the appellant's copyright, and he went on to say:

> . . . I am unable to see how it could reasonably be said that this right was infringed by a broadcast or telecast of a programme emanating from a television station outside Canada, even if such programme included musical works which would in Canada be within the plaintiff's repertoire and in which it would have in Canada the copyright referred to and even if the programme was beamed towards Canada in order to reach Canadian audiences. There is nothing to indicate the commission of any tort in Canada.

There is no dispute as to the tests which have been established for the application of Rules 1 and 4 of Order XI. They were stated by the present Chief Justice of this Court in the *Muzak* case, in which the disagreement between the majority and the minority was not as to the tests to be applied, but as to whether or not the facts in that case met those tests. The Chief Justice, at p. 187, cited extracts from the judgment of Lord Davey in *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabrik*[1] and from that of Lord Simonds in *Vitkovice Horni A Hutni Tezirstvo v. Korner*[2], as follows:

> . . . . Lord Davey said at page 735:
>
> This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction, or on a motion made to discharge an order for such service, called upon to try the action or express a premature opinion on its merits,
>
> * * *
>
> If the Court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so, and dismiss the application or discharge the order. But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff *bonâ fide* desires to try, I think that the court should, as a rule, allow the service of the writ.

[1] (1904), 90 L.T.R. 733.
[2] [1951] A.C. 869, 2 All E.R. 334.

In *Vitkovice Horni A Hutni Tezirstvo v. Korner*, Lord Simonds stated at page 878:

> . . . the obligation of the plaintiff is, not to "satisfy" the court that he is right, but to make it sufficiently appear . . . that the case is a "proper one for service out of the jurisdiction under this order."

Referring to the remarks of Lord Davey in 90 L.T.R., p. 735, (*supra*) Lord Simonds, at page 879, stated:

> It is, no doubt, difficult to say precisely what test must be passed for an applicant to make it sufficiently appear that the case is a proper one.

and at page 880:

> The description "a good arguable case" has been suggested and I do not quarrel with it.

The Chief Justice adopted the test of "a good arguable case" and that is the test which the learned President states, in his reasons, should be applied in the present case.

With great respect, I am not in agreement with the conclusion which the latter has reached in applying that test. The issue which would have to be determined in the present case, if it is tried, is as to whether a person who operates a television transmitter outside Canada, but with the primary object of transmitting programmes for reception in Canada, can be held to have communicated a musical work by radio communication in Canada, so as to have infringed the rights of the holder of the Canadian copyright in such work.

This is a matter on which there does not appear to be any direct authority. The closest analogy which was brought to our attention by counsel is that in the case of *Jenner v. Sun Oil Co. Ltd.*[1], which dealt with an application to set aside an order for service *ex juris*. The issue raised in that case was as to whether, when defamatory statements were broadcast in the United States and received in Ontario, a tort had been committed in Ontario. McRuer C.J.H.C. reached the conclusion that there was "a good arguable case" that the defamatory words were so transmitted as to be published within Ontario.

I have not formed, and would not, at this stage of the proceedings, wish to express, an opinion as to whether or not, assuming as established the allegations contained in the statement of claim, the appellant has a good cause of action against the respondents, but I am satisfied that, on the basis of those allegations and the other material which was before the learned President, the appellant has got

[1] [1952] O.R. 240, 2 D.L.R. 526.

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"a good arguable case". To me it seems arguable that a person who has held himself out to advertisers as being able to communicate, by means of his American television transmitter, with some 1,000,000 persons in British Columbia, if he transmits musical works, of which the appellant has the Canadian copyright, to viewers in Canada who receive such programmes, has thereby communicated in Canada such musical works by radio communication, within the provisions of the *Copyright Act*, R.S.C. 1952, c. 55. The purpose of this action is to determine that very legal point and, in my opinion, it should not be determined at this stage of the proceedings, but ought to be tried.

For these reasons, in my opinion, the order for service *ex juris* should not have been set aside and the present appeal should be allowed, with costs, in the cause, to the appellant in this Court and in the Court below.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Smart and Biggar, Ottawa.

Solicitors for the defendants, respondents: Farris, Stultz, Bull & Farris, Vancouver.

1962
*Nov. 26, 27
1963
Jan. 22

ESSO STANDARD (INTER-AMERICA) INC. ..... APPELLANT;

AND

J. W. ENTERPRISES INC., JOE WEINSTEIN, JOWEIN OPERATING CORP., JOE WEINSTEIN FOUNDATION INC., SAUL ALTMAN, SELMA FINEMAN, ANNA GESCHWIND, J. W. MAYS, INC. PROFIT SHARING TRUST RETIREMENT PLAN AND DAVID GOLDBERG .....RESPONDENTS.

AND

MARGARET A. MORRISROE .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Offer to purchase shares of company by subsidiary of majority shareholder—Offeror not entitled to order for compulsory acquisition of minority shares—Approval of nine-tenths majority required—Shares must be independently held—Companies Act, R.S.C. 1952, c. 53, s. 128(1).

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

E Co., a Delaware corporation, sent an offer to the shareholders of I Co. to purchase all the outstanding shares of that company. E Co. was a wholly owned subsidiary of S Co., a New Jersey corporation, and I Co. was incorporated under the *Companies Act*, R.S.C. 1952, c. 53. The offer was to remain open for a period of not less than four months as required by s. 128(1) of the *Companies Act*. It also stated that S Co. was the owner of 96 per cent of the outstanding shares of I Co. and had indicated its intention to accept the offer and that consequently, E Co. expected to be in a position to give notice under the provisions of s. 128(1) for the compulsory acquisition of the shares of all shareholders who did not accept the offer. S Co. accepted within the four-month period but during that time holders of less than 90 per cent of the free shares accepted.

E Co. obtained an *ex parte* order under s. 128 authorizing it to give notice to the dissenting shareholders for the compulsory acquisition of their shares unless these shareholders moved for an "order otherwise". Two such motions were made by certain dissenting shareholders (the present respondents). These motions, each of which sought an order setting aside the *ex parte* order and a declaration that E Co. was not entitled nor bound to acquire the common shares of the dissenting shareholders, were unsuccessful. Appeals from the orders dismissing both motions were allowed by the Court of Appeal, one member dissenting. E Co. appealed to this Court.

Held: The appeal should be dismissed.

There was substantial identity of interest between the majority shareholder of I Co. and the transferee company. With this identity of interest the whole proceeding was a sham with a foregone conclusion, for the purpose of expropriating a minority interest on terms set by the majority. The promoting force throughout was obviously that of S Co. and not its subsidiary. A transfer of shares from S Co. to E Co. was meaningless in these circumstances as affording any indication of a transaction which the Court ought to approve as representing the wishes of 90 per cent of the shareholders (the percentage required by s. 128(1)). Here the 90 per cent was not independent. The section contemplated the acquisition of 90 per cent of the total issued shares of the class affected and that this 90 per cent must be independently held.

Re Hoare & Co. Ltd. (1933), 150 L.T. 374; *Re Evertite Locknuts Ltd.*, [1945] 1 Ch. 220; *Re Press Caps Ltd.*, [1949] 1 Ch. 434; *Re Sussex Brick Co. Ltd.*, [1961] 1 Ch. 289, distinguished; *Re Bugle Press Ltd.*, [1961] 1 Ch. 270, approved.

Constitutional law—Companies Act, R.S.C. 1952, c. 53, s. 28—Whether intra vires Parliament.

Section 128 of the Dominion *Companies Act* was not unconstitutional. It was truly legislation in relation to the incorporation of companies with other than provincial objects and it was not legislation in relation to property and civil rights in the province or in relation to any matter coming within the classes of subject assigned exclusively to the legislature of the province.

APPEAL from a judgment of the Court of Appeal for Ontario, which, on appeal from Wells J., rejected an application of the appellant, made under s. 128 of the Dominion *Companies Act*, for the compulsory acquisition of certain minority shares of a company. Appeal dismissed.

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ESSO STANDARD (INTER-AMERICA) INC. v. J. W. ENTERPRISES et al. AND M. A. MORRISROE

J. D. Arnup, Q.C., and *J. C. McTague, Q.C.*, for the appellant.

J. J. Robinette, Q.C., for the respondents: J. W. Enterprises Inc. *et al.*

Terence Sheard, Q.C., for the respondent: Margaret A. Morrisroe.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the Attorney General of Canada.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which, on appeal from Wells J., rejected an application of Esso Standard (Inter-America) Inc., made under s. 128 of the Dominion *Companies Act* for the compulsory acquisition of certain minority shares of International Petroleum Company Limited. At the original hearing, Wells J. had made an order for the acquisition of these shares. Section 128(1) reads:

> (1) Where any contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to any other company (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected, or not less than nine-tenths of each class of shares affected, if more than one class of shares is affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice, in such manner as may be prescribed by the court in the province in which the head office of the transferor company is situate, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee company is, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the transferee company.

The respondents are dissenting shareholders who hold approximately 20,000 shares.

On January 12, 1960, Esso Standard sent an offer to the shareholders of International Petroleum Company Limited to purchase all the outstanding shares of this company at a price of $45 U.S. per share. This offer was to remain open for a period of not less than four months as required by the section. It also stated that Esso Standard was an affiliate of

[1] *Sub nom. Re International Petroleum Co. Ltd.*, [1962] O.R. 705, 33 D.L.R. (2d) 658.

Standard Oil Company (New Jersey) and that this company was the owner of 96 per cent of the outstanding shares of International Petroleum and had indicated its intention to accept the offer of $45 per share and that consequently, Esso Standard expected to be in a position to give notice under the provisions of s. 128(1) for the compulsory acquisition of the shares of all shareholders who did not accept the offer of $45 per share.

Esso Standard is a corporation incorporated under the laws of the State of Delaware and the whole of its issued and outstanding shares were at the date of the offer and at the date of the hearing owned by Standard Oil Company (New Jersey). The following table shows the shareholdings of International Petroleum at the date of the offer, January 12, 1960:

Issued and outstanding	14,568,583	
Held by Standard Oil of New Jersey	14,095,917	(96.75%)
Held by 3,423 other shareholders	474,660	
Outstanding options for shares	2,400	

By May 12, 1960, four months after the date of the offer, 2,478 shareholders, holding 377,281 shares had accepted. This was, of course, less than 90 per cent of the free shares. By November 21, 1960, 3,054 shareholders, holding 434,146 shares, had accepted.

Thus, at the date of the hearing before Wells J., out of the shares held by shareholders other than Standard Oil of New Jersey, there were only approximately 40,000 shares the owners of which had not accepted the offer. About half of these outstanding shares are held by the respondents. Standard Oil of New Jersey accepted within the four-month period.

On May 18, 1960, the Court made an *ex parte* order under s. 128 authorizing Esso Standard to give notice to the dissenting shareholders for the compulsory acquisition of their shares at $45 per share unless these shareholders made a motion to the contrary within the statutory period of one month.

Within one month two such motions were made by certain dissenting shareholders, who are the respondents in this appeal. Each motion sought an order setting aside the *ex parte* order of May 18, 1960, and a declaration that Esso

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Standard was not entitled nor bound to acquire the common shares of the dissenting shareholders. Wells J. dismissed both motions on August 31, 1961.

On April 12, 1962, the Court of Appeal allowed the appeals from the orders of Wells J. and declared that "Esso Standard (Inter-America) Inc., is not entitled nor bound to acquire the shares of the appellants or any of them in International Petroleum Company Limited". Schroeder J.A. dissented and would have dismissed the appeals.

Section 128 of the Canadian Act is based upon a section of the English *Companies Act* which now appears as s. 209 of the *Companies Act* of 1948. The English section was first enacted in 1929 and the Canadian section in 1934. One significant difference between the two Acts is that the English Act provides that in computing the nine-tenths of the shares affected, there shall not be included "shares already held at the date of the offer by or by a nominee for the transferee company or its subsidiary".

At the date of the offer, January 12, 1960, Esso Standard held no shares of International Petroleum but it was a wholly owned subsidiary of Standard Oil of New Jersey, which held on that date 96.75 per cent of the issued shares. It is apparent that if s. 128 permitted Esso Standard to do what it proposed to do, the transfer of this 96.75 per cent would follow as a matter of course and that the necessary percentage would be obtained at one stroke. The outside shareholders were told this in the notice or offer.

The reported cases on the sections, both in England and Canada, have been comparatively few. There was little guidance to be found in the legislation itself on the principles to be applied in considering a dissenting shareholder's application for an "order otherwise" under the section. These were first formulated by Maugham J. in *Re Hoare & Company Limited*[1], and followed—it seems to me with increasing emphasis on the difficulties in the way of a dissenting shareholder—in three other cases. These were *In re Evertite Locknuts, Limited*[2]; *In re Press Caps Limited*[3];

[1] (1933), 150 L.T. 374. [2] [1945] 1 Ch. 220.
[3] [1949] 1 Ch. 434.

and *In re Sussex Brick Company Limited*[1] (decided in 1959 but reported in 1961). The matter is summarized in Palmer's Company Law, 20th ed., at p. 691:

> When an application is made to the court by a shareholder who alleges that the terms are not fair, the onus is upon the applicant to establish his allegation. The court will attach considerable weight to the fact that the large body of shareholders have accepted the offer. An application by a shareholder must allege unfairness; it is not sufficient merely to say that insufficient information was given; discovery will not be allowed, upon such an application, to enable the shareholder to establish his case.

In each of these cases there was, I think, a true "takeover bid" where, with more than 90 per cent of the shares of the transferor company held by independent shareholders, the transferee company had acquired 90 per cent of the total outstanding shares. This was certainly so in *Re Hoare* and in *Re Press Caps Limited,* according to the statement of Evershed M.R. in *Re Bugle Press Limited*[2].

It is at once apparent that on the facts there is no resemblance between Esso's position in the present case and the first four English cases above referred to and, in my opinion, these cases give no guidance on what should be done in the present case.

I agree with Laidlaw J.A. that in this case the Court should grant the dissenting shareholders' applications for "order otherwise" for the reasons given by the Court of Appeal in England in the case of *In re Bugle Press, supra.*

The shares involved in the *Bugle Press* case were those of a small publishing company with an issued share capital of 10,000 shares of £1 each. Two majority shareholders held 4,500 shares each and the third, 1,000 shares. The majority shareholders wished to buy out the minority shareholder and had made him a private offer which he had rejected. They then caused a transferee company to be incorporated of which they held all the outstanding shares. This transferee company then made an offer of £10 per share to all three shareholders. The £10 per share was based on a valuation made by a firm of chartered accountants and was less than the private offer that had previously been made. The immediate result of the offer of the transferee company at £10 per share was the acquisition of 90 per cent of the shares of the transferor company from the two majority shareholders. The transferee company then gave notice of its

[1] [1961] 1 Ch. 289.

[2] [1961] 1 Ch. 270 at 284.

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intention to exercise its powers of compulsory acquisition under s. 209 of the *Companies Act, 1948*. The minority shareholder moved for a declaration similar to the one sought in the present case, that the transferee company was neither entitled nor bound to acquire his shares on the terms offered notwithstanding the approval of nine-tenths of the shareholders.

Buckley J. made the order sought by the minority shareholder. He held that in the circumstances of this particular case the onus was on the transferee company to show that the scheme was one which the minority shareholder ought to be compelled to accept. This was a reversal of the onus placed on the dissenting shareholder in the ordinary case to show unfairness. He also held that when the 90 per cent majority shareholders are themselves in substance the transferee company, the Court ought to "order otherwise" when compulsory acquisition is sought.

The Court of Appeal, in affirming Buckley J., founded its judgment upon his second ground—substantial identity of interest between the majority shareholders and the transferee company. With this identity of interest the whole proceeding, as Laidlaw J.A. stated it, is a sham with a foregone conclusion, for the purpose of expropriating a minority interest on terms set by the majority. Evershed M.R., at p. 286, said:

> Even, therefore, though the present case does fall strictly within the terms of section 209, the fact that the offeror, the transferee company, is for all practical purposes entirely equivalent to the nine-tenths of the shareholders who have accepted the offer, makes it in my judgment a case in which, for the purposes of exercising the court's discretion, the circumstances are special—a case, therefore, of a kind contemplated by Maugham J. to which his general rule would not be applicable. It is no doubt true to say that it is still for the minority shareholder to establish that the discretion should be exercised in the way he seeks. That, I think, agreeing with Mr. Instone, follows from the language of the section which uses the formula which I have already more than once read "unless on an application made by the dissenting shareholder the court thinks fit to order otherwise." But if the minority shareholder does show, as he shows here, that the offeror and the 90 per cent. of the transferor company's shareholders are the same, then as it seems to me he has, prima facie, shown that the court ought otherwise to order, since if it should not so do the result would be, as Mr. Instone concedes, that the section has been used not for the purpose of any scheme or contract properly so called or contemplated by the section but for the quite different purpose of enabling majority shareholders to expropriate or evict the minority; and that, as it seems to me, is something for the purposes of which, prima facie, the court ought not to allow the section to be invoked—unless at any rate it

were shown that there was some good reason in the interests of the company for so doing, for example, that the minority shareholder was in some way acting in a manner destructive or highy damaging to the interests of the company from some motives entirely of his own.

Evershed M.R. did not base his judgment on the proviso in the English section that in computing the nine-tenths of the shares affected there should not be included "shares already held at the date of the offer by, or by a nominee for, the transferee or its subsidiary". Although the case was within the standard of computation laid down by the section and the shares were not held in the manner stated in the exclusion, the Court should "order otherwise" because the section was not intended to cover this kind of case.

There is no distinction between *Bugle Press* and the present case either on fact or law. This was the opinion of Laidlaw J.A. and I fully agree. We have here 90 per cent ownership in Standard Oil Company (New Jersey). The promoting force throughout is obviously that of Standard Oil and not its subsidiary. A transfer of shares from Standard Oil to Esso Standard is meaningless in these circumstances as affording any indication of a transaction which the Court ought to approve as representing the wishes of 90 per cent of the shareholders. This 90 per cent is not independent. On this ground alone I would reject the appeal and hold that the section contemplates the acquisition of 90 per cent of the total issued shares of the class affected and that this 90 per cent must be independently held.

Esso Standard cannot strengthen its position by pointing to the extent of its acquisition of the independent shares. These constituted less than 4 per cent of the total issue and even then, as I have pointed out above, it did not acquire 90 per cent of those shares within the four-month period.

Wells J. and Schroeder J.A. were impressed by this large acquisition of the independent shares. They thought that this was sufficient to enable them to find that a substantial number of shareholders of International Petroleum had by their acceptance expressed their favourable opinion of the offer (which was almost 50 per cent above the stock exchange quotation) and that the dissenting shareholders had not satisfied them of the unfairness of the offer.

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It is very difficult to draw this kind of inference from the facts of this case. Although the number of shares held by independent shareholders is large, the percentage of the total issued shares that they represented is very small. It is, further, difficult to infer to what extent these independent shareholders were influenced by the terms of the offer when they were told that the matter was a foregone conclusion. It is also very difficult to draw any inference as to value from stock exchange quotations when more than 90 per cent of the shares are held by one shareholder.

The extent of the acquisition and evidence of value are, however, irrelevant in this case and I found my judgment solely on the principle set out in *Bugle Press*. I think that it was foreseen in the *obiter* opinion of Rand J. in *Rathie v. Montreal Trust Company et al.*[1], when he said:

> This comparatively new power by which a majority may coerce a minority is one to be exercised in good faith and with the controlling facts available to shareholders to enable them to come to a decision one way or the other. In most, at least, of the cases which have reached the courts in England, the circumstances showed a straightforward transaction with its business considerations made evident to the shareholders. The analogy which obviously suggests itself is that of the sale of a company's undertaking. Such a power has long been accorded companies, and the equivalent transfer by way of share acquisition presents no greater objection in principle except in relation to individual shareholders. One can easily imagine resort to s. 124 for a purely arbitrary acquisition of shares of a small interest by a larger one, but I cannot think the provision was introduced for any such a purpose; and it is significant that it is to a company and not an individual that the power is given.

The respondents, in support of their judgment, submitted an alternative argument that s. 128 was unconstitutional. The question had been raised and argued in the *Rathie* case but this Court found it unnecessary to decide the point because of the failure of the transferee company to comply with the time requirements of the section. It has again been raised and fully argued throughout the course of the litigation. There has been complete unanimity throughout that Parliament has the power to enact s. 128. The matter was summarized by Laidlaw J.A. as follows:

> It is my opinion that the Parliament of Canada having legislative power to create companies whose objects extend to more than one Province possesses also the legislative power to prescribe the manner in which shares of the capital of such companies can be transferred and acquired. That matter is one of general interest throughout the Dominion.

[1] [1953] 2 S.C.R. 204 at 213.

It is truly legislation in relation to the incorporation of companies with other than provincial objects and it is not legislation in relation to property and civil rights in the province or in relation to any matter coming within the classes of subject assigned exclusively to the legislature of the province. It deals with certain conditions under which a person may become a shareholder or lose his position as a shareholder in such a company and, in my opinion, this case is completely covered by the reasons of this Court in *Reference re constitutional validity of s. 110 of the Dominion Companies Act*[1]. This was also the opinion of the British Columbia Courts in the *Rathie* case[2].

I would dismiss the appeal with costs. Although all the Attorneys-General of the Provinces were notified, no one appeared on their behalf. The Attorney General of Canada did appear. There should be no order for costs to or against him.

Appeal dismissed with costs.

Supplementary Reasons

We have been asked by counsel to explain whether our reasons also apply to the 21,645 shares held by 360 or 361 shareholders who were "unheard from" at the date of the motion before Wells J. These shareholders had neither accepted the offer nor moved for an "order otherwise" under s. 128 of the Act.

We all agree that, on the facts recited in our reasons, s. 128 was not applicable at all and that the appellant did not acquire the 21,645 shares by virtue of s. 128.

The respondents, when they moved before Wells J., asked to have set aside the *ex parte* order of Landreville J. dated May 18, 1960. This relief was not included in the judgment of the Court of Appeal. It should be included in the judgment of this Court.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

[1] [1934] S.C.R. 653, 4 D.L.R. 6.

[2] (1952), 5 W.W.R. (N.S.) 675, 3 D.L.R. 61; affirmed, (1952), 6 W.W.R. (N.S.) 652, 4 D.L.R. 448.

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Solicitor for the respondents, J. W. Enterprises Inc. et al.: John J. Robinette, Toronto.

Solicitors for the respondent, Margaret A. Morrisroe: Johnston, Sheard & Johnston, Toronto.

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*Dec. 5

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RALPH HANES (*Defendant*) .....APPELLANT;

AND

THE WAWANESA MUTUAL INSURANCE COMPANY (*Plaintiff*) ..... } RESPONDENT.

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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile—Action by insurer for reimbursement of payment in satisfaction of judgment against insured—Insured alleged to have been intoxicated in breach of statutory condition of policy—Standard of proof applicable—The Evidence Act, R.S.O. 1950, c. 119, s. 20—The Insurance Act, R.S.O. 1950, c. 183, s. 214.

The respondent company brought an action pursuant to the provisions of s. 214(8) of *The Insurance Act*, R.S.O. 1950, c. 183, for reimbursement of a certain sum paid by it towards satisfaction of a judgment against the appellant. The latter was insured with the respondent under a standard automobile policy and was the unsuccessful defendant in an action brought by several plaintiffs arising out of a motor vehicle accident. The respondent alleged that the said sum was one which it would not have been liable to pay except for the provisions of s. 214(1) and 3(ii) of the Act because the appellant at the time of the accident was "under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile" within the meaning of the prohibition in statutory condition 2(1)(*a*) of the policy. The trial judge was of the opinion that on a reasonable balance of probabilities the appellant was under the influence of intoxicating liquor to the extent specified in statutory condition 2(1)(*a*), but he was also of the opinion that he was bound to be satisfied beyond a reasonable doubt as to the intoxication of the appellant.

The Court of Appeal allowed an appeal and directed a new trial on a different ground, *viz.*, that the trial judge had erred in his interpretation of the effect of s. 20 of *The Evidence Act*, R.S.O. 1950, c. 119 [now R.S.O. 1960, c. 125, s. 24] in refusing to declare two of the witnesses to be "adverse" within the meaning of that section and

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Martland and Ritchie JJ.

thereby excluding prior statements made by them which contradicted statements which they had made on the witness stand. The appellant appealed from the latter finding, and the respondent cross-appealed, saying that the trial judge erred in thinking himself to be bound to be satisfied beyond a reasonable doubt as to the intoxication of the appellant and that his finding, based on reasonable probability, was sufficient to entitle the respondent to judgment.

Held: (Cartwright J. dissenting): The appeal should be dismissed and the cross-appeal allowed.

Per Kerwin C.J. and Taschereau, Martland and Ritchie JJ.: The trial judge applied the wrong standard of proof and the question of whether or not the appellant was in a state of intoxication at the time of the accident was a question which ought to have been determined according to the "balance of probabilities". *Cooper v. Slade* (1858), 6 H.L. Cas. 746; *Doe dem. Devine v. Wilson et al.* (1855), 10 Moo. P.C.C. 502; *Clark v. The King* (1921), 61 S.C.R. 608; *Lek v. Mathews* (1927), 29 Lloyd's List Law Reports 141; *Earnshaw v. Dominion of Canada General Insurance Co.*, [1943] O.R. 385; *Bater v. Bater*, [1950] 2 All E.R. 458; *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312; *New York Life Insurance Co. v. Schlitt*, [1945] S.C.R. 289; *Harvey v. Ocean Accident and Guarantee Corp.*, [1905] 2 I.R. 1; *Industrial Acceptance Corp. v. Couture*, [1954] S.C.R. 34, referred to; *London Life Ins. Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*, [1929] S.C.R. 117, discussed.

The trial judge, while applying the standard of proof applicable in criminal cases, nevertheless expressed his opinion that on a reasonable balance of probabilities the appellant was under the influence of liquor to such an extent as to be for the time being incapable of the proper control of his automobile. This opinion was based in large degree upon his assessment of the quality and credibility of the witnesses and there was evidence upon which he could make such a finding. The Chief Justice of the Court of Appeal did not dissent from this conclusion and one of the Justices of Appeal not only adopted it, but would have gone further and found intoxication to be proved even according to the standard by which the trial judge thought himself to be bound. That being so, the opinion as to the appellant's state of intoxication which was reached by the trial judge in accordance with "a reasonable balance of probabilities" should not be reversed (*Union Insurance Society of Canton Ltd. v. Arsenault*, [1961] S.C.R. 766 and *Prudential Trust Co. Ltd. v. Forseth*, [1960] S.C.R. 210) and as this was the proper basis on which to determine such a question in a civil case, the appeal should be disposed of in accordance with it with the result that the appellant was found to have been in breach of statutory condition 2(1)(*a*) so that the respondent was entitled to reimbursement of the sum paid by it in satisfaction of the judgment in accordance with s. 214(8) of *The Insurance Act*. In view of this decision, it was unnecessary to consider the question concerning the interpretation of s. 24 of *The Evidence Act*, raised in the main appeal.

Per Cartwright J., *dissenting:* While agreeing with the reasons and conclusion of the majority on the question of law as to the applicable standard of proof, a different view was held on the question of fact as to whether the evidence adduced at the trial was sufficient to satisfy the onus which rested upon the respondent.

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The trial judge was correct in holding that "adverse" in s. 20 of *The Evidence Act*, R.S.O. 1950, c. 119 [now s. 24 of R.S.O. 1960, c. 125] means "hostile", and he was right in deciding not to look at prior statements made by two of the witnesses, which were inconsistent with the evidence they gave at the trial, for the purpose of forming his opinion as to whether the said witnesses were hostile.

The evidence, considered as a whole, was insufficient to discharge the burden which rested on the respondent of satisfying the Court by a preponderance of evidence that at the time of the accident the appellant was under the influence of intoxicating liquor to such an extent as to be incapable of the proper control of an automobile.

APPEAL and cross-appeal from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Wilson J. Appeal dismissed and cross-appeal allowed, Cartwright J. dissenting.

G. William Gorrell, Q.C., for the defendant, appellant.

Adrian T. Hewitt, Q.C., and *F. J. McDonald*, for the plaintiff, respondent.

The judgment of Kerwin C.J. and Taschereau, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This action was brought by the respondent pursuant to the provisions of s. 214(8) of *The Insurance Act*, R.S.O. 1950, c. 183, for reimbursement of the sum of $22,174.85 paid by it towards satisfaction of a judgment against the appellant who was insured with the respondent under a standard contract of automobile liability insurance and who was the unsuccessful defendant in an action brought by several plaintiffs arising out of a motor vehicle accident which occurred some time after 11:00 o'clock on the night of May 16, 1958. The respondent has alleged that the said sum was one which it would not have been liable to pay except for the provisions of s. 214(1) and (3)(ii) of the said *Insurance Act* because the appellant at the time of the accident was "under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile" within the meaning of the prohibition in statutory condition 2(1)(*a*) of the said policy.

It is not seriously disputed that if the appellant was so intoxicated as to be in breach of the said statutory condition the respondent is entitled to succeed in this action.

[1] [1961] O.R. 495 28 D.L.R. (2d) 386.

Mr. Justice Wilson, who presided at the trial, made the following finding of fact concerning the condition of the appellant during the evening before and at the time of the accident:

> The defendant, who is a driver of cattle, entered Willards Restaurant in Spencerville about 7:00 p.m. in company with one Earl. He had been drinking; his speech in the restaurant was not too clear in giving his order; his eyes were hazy looking. He ordered a bowl of soup and was served with it, and also with crackers. He was slovenly in the consumption of both, in that he left some mess on the counter. He appeared to be quite drowsy, and dozed a bit while sitting on a stool at the counter in the restaurant. About 7:30 p.m. the Defendant and Earl left the restaurant and proceeded southerly a short distance, in the direction of an hotel. About 10:30 p.m. Hanes and Earl came out of the hotel, which has an entrance on a side street, which leads to the main street Highway No. 16, and entered the blue Oldsmobile which was driven to the Highway, where it came to a stop, and then drove off north at a fast pace. The accident, to which reference has been made, occurred shortly afterwards. The Woodwark car, after the impact, was forced northerly, that is to say against the direction from which it was coming; it turned over and came to rest upside down on the westerly side of the road. The Hanes car proceeded north, beyond the point of impact, and came to rest facing in a north-easterly direction, I think it was, and with the door on the passenger side open, Earl lying outside the car and Hanes still in it. Hanes smelt of alcohol when he was found. He was unconscious. According to the evidence at the trial he had no memory from noon of the day of the accident. Neither Hanes nor Earl gave evidence at the trial.

After finding that the witnesses who testified as to the appellant's sobriety, with the exception of one who had seen him earlier in the day, ought not to be believed, the learned trial judge went on to say:

> After long experience in trying both civil and criminal cases I am of the opinion, that on a reasonable balance of probabilities, that Hanes was under the influence of intoxicating liquor to such an extent as to be for the time being incapable of proper control of his automobile. However, the rule in civil cases, although this is a civil case, according to authority, which I interpret to be binding upon me, is not the rule to be applied, namely the rule as laid down in London Life Insurance Company v. Trustee of the Property of Lang Shirt Co. Ltd., [1929] S.C.R. 117, as interpreted in Earnshaw v. Dominion of Canada Insurance Company, [1943] O.R. 385.

and he proceeded to adopt the following statement made by Robertson C.J.O. in the latter case:

> In a case of this nature, which is a civil action, but where it is necessary for the respondent to establish a breach of criminal law by the other side, the evidence must be substantially the same as would secure a conviction in the criminal courts.

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Ritchie J.

In the Court of Appeal[1], Chief Justice Porter made no reference to the learned trial judge's opinion based "on a reasonable balance of probabilities that Hanes was under the influence of intoxicating liquor" to the extent specified in statutory condition 2(1)(*a*), but he agreed that the rule to be applied was the same as that necessary to secure a conviction in the criminal courts. Roach J.A. stated that he would hesitate to hold that as a matter of probability the defendant was under the influence of intoxicating liquor at the time of the collision to the extent prohibited by the statutory condition. MacKay J.A., on the other hand, concluded that even applying the standard of proof which was accepted by the trial judge the evidence would have justified a finding for the respondent.

The Court of Appeal, however, allowed the appeal and directed a new trial on a different ground, *viz.*, that the learned trial judge had erred in his interpretation of the effect of s. 24 of *The Evidence Act*, R.S.O. 1960, c. 125, in refusing to declare two of the witnesses to be "adverse" within the meaning of that section and thereby excluding prior statements made by them which contradicted statements which they had made on the witness stand. It is from this latter finding of the Court of Appeal that the appellant now appeals and the respondent cross-appeals, saying that the learned trial judge erred in thinking himself to be bound to be satisfied beyond a reasonable doubt as to the intoxication of the appellant and that his finding, based on reasonable probability and concurred in by MacKay J.A., was sufficient to entitle the respondent to judgment.

The question raised by the cross-appeal is one which warrants a consideration of the development of the authorities in England and in this Court. In England the most authoritative of the early decisions on this subject was that of the House of Lords in *Cooper v. Slade*[2], in which a quasi-criminal issue was clearly involved, the suit being for the recovery of a fine under the *Corrupt Practices Prevention Act* of 1854, and Willes J. nevertheless said:

> . . . I may be excused for referring to an authority in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict. I find such an authority referred to in Mr. Best's very able and instructive treatise on the Principles of Evidence (2 Edit. p. 114). So long since as the 14th of Elizabeth, Chief

[1] [1961] O.R. 495, 28 D.L.R. (2d) 386.

[2] (1858), 6 H.L. Cas. 746, 27 L.J.Q.B. 449.

Justice Dyer and a majority of the other Justices of the Common Pleas laid down this distinction between pleadings and evidence, "that in a writ or declaration or other pleading certainty ought to be shown, for there the party must answer to it, and the Court must adjudge upon it; and that which the party shall be compelled to answer to, and which is the foundation whereupon the Court is to give judgment, ought to be certain, or else the party would be driven to answer to what he does not know, and the Court to give judgment upon that which is utterly uncertain. But where the matter is so far gone that the parties are at issue, or that the inquest is awarded by default, so that the jury is to give a verdict one way or the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence."

Of even more significance is the decision of the Privy Council in *Doe dem. Devine v. Wilson et al.*[1], where the issue turned on whether or not the signature to a deed had been forged and the trial judge had directed the jury that if they had a reasonable doubt the defendants would have the benefit of that doubt, and Mr. Justice Patteson, speaking for the Judicial Committee, at p. 532 said:

> Certainly, it has been the practice so to direct the jury in a criminal case; whether on motives of public policy or from tenderness to life and liberty, or from any other reason, it may not be material to inquire, but none of those reasons apply to a civil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not, be raised, the *onus* would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordships' opinion, apply.

Earlier in the same decision Mr. Justice Patteson had defined the duty of a jury in such a case in the following terms:

> The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities.

It would not be accurate to suggest that this view of the matter was universally adopted by all the judges of 19th-century England because cases such as *Thurtell v. Beaumont*[2], are to the contrary effect, but it has long since been accepted by such authorities on the law of evidence as Phipson (see 9th ed. p. 9) and Wigmore (see 3rd ed. para. 2498 at p. 327) that the weight of authority favours the balance of probability as the proper test in such a case, and in 1921 in *Clark v. The King*[3], Duff J. (as he then was) quoted at length and with approval from the decision in *Doe dem. Devine v. Wilson et al., supra.*

[1] (1855), 10 Moo. P.C.C. 502. [2] (1823), 1 Bing. 339.
[3] (1921), 61 S.C.R. 608 at 616-7.

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In 1927 the case of *Lek v. Mathews*[1], came before the House of Lords, and Lord Sumner had occasion to say at p. 164:

> With great respect to the Lords Justices it seems to me that what has really made both this forgery theory and this construction of the claim attractive has been a strong reluctance to say that Mr. Lek has tried to cheat and has backed his effort by perjury. This has been supported by a canon, new to me in the form employed, to the effect that such a man as Mr. Lek cannot be convicted of this so long as any reasonable possibility remains of explaining his conduct otherwise. I am afraid I look at it differently and think that this is wholly without authority. When prisoners could not give evidence, such an appeal might have passed muster with a jury, but on a civil issue I do not think more is required than a correct appreciation of the incidence and the shifting of the onus of proof and a reasonable estimate of the weight *pro* and *con* of the various parts of the evidence. Mr. Lek's reputation and wealth are material only as ground for considering the probability of such misconduct. The consequences of a verdict against him are quite immaterial. I am just as reluctant to make the underwriters pay Mr. Lek many thousands of pounds, if he has been guilty of making a false claim, as to find him guilty of it if he has not. The whole question is whether it has been proved; and I think it has.

It is against the background of these decisions that the reasons for judgment delivered by Mignault J. on behalf of himself, Anglin C.J. and Rinfret J. in *London Life Insurance Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*[2], must be considered.

The passage in that judgment upon which Robertson C.J.O. in *Earnshaw v. Dominion of Canada General Insurance Company, supra,* placed the interpretation by which the trial judge in the present case felt himself to be bound does not, in my view, bear that interpretation when it is subjected to analysis. The first sentence of the passage reads:

> That there is, in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt.

The fact that the words "proof of a more cogent character" are by no means synonymous with "proof beyond a reasonable doubt" is well illustrated by what was said by Denning L.J. in *Bater v. Bater*[3]:

> The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words

[1] (1927), 29 Lloyd's List Law Reports 141.
[2] [1929] S.C.R. 117, 1 D.L.R. 328. [3] [1950] 2 All E.R. 458 at 459.

than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

The same thought was expressed in different language by Cartwright J. in *Smith v. Smith and Smedman*[1], where he said:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed *including the gravity of the consequences of the finding.*

(The italics are mine.)

The passage from the judgment of Mignault J. continues:

> In criminal cases this rule is often expressed by saying that the crime imputed must be proved to the exclusion of reasonable doubt. There is authority for the proposition that the same presumption of innocence from crime should be applied with equal strictness in civil as well as in criminal cases (Taylor, Evidence, 11th ed., vol. 1, par. 112, and cases referred to). Whether or not, however, the cogency of the presumption is as great in civil matters as in criminal law (*a point not necessarily involved here*), I would like to adopt the statement of the rule by Middleton J.A., in the court below, which appears entirely sound:
>
> > . . . While the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational conclusion that the evil act was in fact committed. See Alderson, B., in *Rex v. Hodge,* (1838) 2 Lewin C.C. 227.
>
> I would also refer to the authorities cited by Riddell J.A., in the court below, dealing with the presumption against suicide.

(The italics are mine.)

With the greatest respect for the view expressed by Robertson C.J.O. in the *Earnshaw* case, *supra,* I do not think that the language above quoted establishes the rule that where

[1] [1952] 2 S.C.R. 312 at 331, 3 D.L.R. 449.

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in civil cases it is necessary to establish a breach of criminal law "the evidence must be substantially the same as would secure a conviction in the criminal courts". In fact it appears to me that Mignault J. expressly dissociated himself from any such finding by saying that "the point is not necessarily involved here".

It is true that Mignault J. proceeded to adopt the statement of Middleton J.A. in the Court below which is phrased in much the same language as that employed in the famous judgment of Baron Alderson in *Rex v. Hodge, supra,* but Middleton J.A. was careful to preface his reference to that case with the words "While the rule is not so strict in civil cases as in criminal . . . ." and I think that in the light of the authorities then existing it must be taken that in adopting this paragraph Mignault J. was adopting the rule in *Hodge's* case, *supra,* modified for application to civil cases, and that the statement must be read as meaning that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal the Court must be satisfied not only that the circumstances are consistent with the commission of the criminal act but that the facts are such as to make it reasonably probable, having due regard to the gravity of the suggestion, that the act was in fact committed. It appears to me that Mignault J.'s reference "to the authorities cited by Riddell J.A., in the court below" is indicative of his approach to the problem.

In dealing with the American cases on the subject, Riddell J.A. had said in 62 O.L.R. 83 at 90:

> In the Vermont case of *Walcott v. Metropolitan Life Insurance Co.* (1891), 64 Vermont 221, 33 Am. St. Repr. 923, it is said that if recovery upon a policy of life insurance is resisted on the ground that the assured committed suicide, the defendant must satisfy the jury, *by a preponderance of competent evidence,* that the injuries which caused death were intentional on the part of the assured; and I agree in that statement of the law. The cases cited fully support the proposition of the Vermont Court: . . . .

(The italics are mine.)

Any doubt about the meaning of Mr. Justice Mignault's statement seems to me to be further clarified by the observations of Newcombe J. who agreed with his conclusion and said at p. 133:

> The question is one of probabilities and inferences, and the Appellate Division was as well qualified to weigh and determine these as the learned trial judge.

In the case of *The New York Life Insurance Company v. Schlitt*[1], this Court was again required to decide the question of whether or not an insured had committed suicide and Taschereau J. adopted the language used in *Harvey v. Ocean Accident and Guarantee Corporation*[2], where it was held that:

> If a man is found drowned, and certainly drowned either by accident or by suicide, and there is *no preponderance of evidence* as to which of the two caused his death, is there any presumption against suicide which will justify a jury or an arbitrator in finding that the death was accidental and innocent, and not suicidal and criminal? In my opinion there clearly is such a presumption. (The italics are mine.)

In the same case, Rand J. said at p. 309:

> When a point has been reached at which suicide becomes a reasonable conclusion or counter-balances accident, the legal effect of the presumption is exhausted.

Although in the case of *Smith v. Smith and Smedman, supra,* the Court was considering the standard necessary for the proof of the commission of a marital offence, it is nonetheless significant to note that Locke J., speaking for the majority of the Court at p. 330, expressly recognized the authority of Sir John Patteson's decision in *Doe dem. Devine v. Wilson et al., supra.*

The effect of the above-noted cases decided in this Court was stated by Fauteux J., speaking on behalf of himself and Taschereau J. in *Industrial Acceptance Corporation v. Couture*[3], where he said at p. 43:

> Il se peut qu'accusé devant les tribunaux criminels d'avoir volé ce camion, Gagnon ait une défense ou des explications à offrir et qu'un jury ne soit pas, par la preuve ci-dessus, convaincu hors de tout doute de sa culpabilité. Mais, dans une cause civile où la preuve d'un crime est matérielle au succès de l'action, la règle de preuve applicable n'est pas celle prévalant dans une cause criminelle où les sanctions de la loi pénale sont recherchées, mais celle régissant la détermination de l'action au civil.

No other members of the Court in that case found it necessary to deal expressly with the question of burden of proof, but the acceptance of the rule adopted by Fauteux J. appears to me to be implicit in the conclusion of the majority that the automobile in question was stolen from the appellant.

[1] [1945] S.C.R. 289, 2 D.L.R. 209. [2] [1905] 2 I.R. 1 at 29.
[3] [1954] S.C.R. 34.

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Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the "balance of probabilities".

It has been noted that the learned trial judge, while applying the standard of proof applicable in criminal cases, nevertheless clearly expressed his opinion:

> . . . that on a reasonable balance of probabilities . . . Hanes was under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of his automobile.

While I am unable to say from the evidence disclosed in the record before us that I would necessarily have reached the same conclusion, it is nevertheless clear from his reasons that the learned trial judge based this opinion in large degree upon his assessment of the quality and credibility of the witnesses whom he had the advantage of seeing on the witness stand and there was evidence upon which he could make such a finding. Furthermore, Chief Justice Porter in the Court of Appeal did not dissent from this conclusion, and MacKay J.A. not only adopted it, but would have gone further and found intoxication to be proved even according to the standard by which the trial judge thought himself to be bound. This being so, I do not think that the opinion as to the appellant's state of intoxication which was reached by Mr. Justice Wilson in accordance with "a reasonable balance of probabilities" should be reversed (see *Union Insurance Society of Canton Limited v. Arsenault*[1], and *Prudential Trust Company Limited v. Forseth*[2]) and as this seems to me to be the proper basis on which to determine such a question in a civil case, I would dispose of this appeal in accordance with it with the result that I find the appellant to have been in breach of statutory condition 2(1)(*a*) of the said policy so that the respondent is entitled to reimbursement of the sum paid by it in satisfaction of the said judgment in accordance with s. 214(8) of *The Insurance Act*.

[1] [1961] S.C.R. 766 per Martland J. at 769, 30 D.L.R. (2d) 573.
[2] [1960] S.C.R. 210, 30 W.W.R. 241, 21 D.L.R. (2d) 587.

In view of the above, it becomes unnecessary for me to consider the interesting question concerning the interpretation to be placed on s. 24 of *The Evidence Act,* R.S.O. 1960, c. 125, which is raised by the main appeal.

I would accordingly allow the cross-appeal and direct that the order of the Court of Appeal be varied and that the judgment of the trial judge be set aside and that judgment be entered for the plaintiff-respondent against the defendant-appellant for the sum of $22,174.85 together with the costs of the trial, of the appeal to the Court of Appeal, and of the cross-appeal to this Court.

CARTWRIGHT J. (*dissenting*):—The findings of fact made by the learned trial judge and the course of the proceedings in the Courts below are set out in the reasons of my brother Ritchie which I have had the advantage of reading. I agree with his reasons and conclusion on the question of law as to the applicable standard of proof but differ from his view on the question of fact as to whether the evidence adduced at the trial was sufficient to satisfy the onus which rested upon the respondent. This renders it necessary for me to examine the ground upon which the majority in the Court of Appeal proceeded, dealing with the interpretation of s. 20 of *The Evidence Act,* and also to say something about the evidence.

Section 20 of *The Evidence Act,* R.S.O. 1950, c. 119, is now s. 24 of *The Evidence Act,* R.S.O. 1960, c. 125, which reads as follows:

> 24. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or if the witness in the opinion of the judge or other person presiding proves adverse such party may by leave of the judge or other person presiding prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement.

Hereafter, in these reasons, I shall refer to this section as s. 24.

The two questions as to the application of this section in the circumstances of the case at bar on which there has been a difference of opinion in the Courts below are (i) whether the word "adverse" as used in the section means hostile or merely unfavourable to the case of the party calling the witness, and (ii) whether in forming his opinion that the

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witness does or does not prove adverse the judge may examine the statement inconsistent with his present testimony which the witness is said to have made.

In the case of two of the witnesses produced by the plaintiff counsel asked the learned trial judge to declare the witness adverse and to permit him to prove that the witness had made an earlier statement inconsistent with the evidence he had just given.

The witnesses in question were William Joseph Dake and Doctor Pember Alton MacIntosh. In the case of each application the learned trial judge said that nothing had occurred up to that point to cause him to think that the witness was hostile; counsel then asked the learned trial judge to look at the statement to assist himself in forming the opinion whether or not the witness was hostile. After hearing full argument the learned trial judge held, following *Greenough v. Eccles*[1], that adverse as used in the section means hostile and said:

> I should state it is my view of the law that a witness must be proved to be hostile and the hostility must be gathered by the judge from the demeanour, the language, the witness' manner in the witness box, and all those elements which are indefinable, but which nevertheless do convey an impression to the judge whether or not a witness is hostile. I am unable to find such hostility in this case.

The learned trial judge declined to look at the statements or consider their contents. In my opinion, both of these rulings were correct.

In the Court of Appeal, Porter C.J.O. was of opinion that "adverse" in s. 24 means "unfavourable" and not "hostile", that the prior statements should have been allowed to be introduced and that there should be a new trial. Mackay J.A. was of opinion that "adverse" means merely "unfavourable" but that on the assumption it means "hostile" the learned trial judge was entitled to examine the previous statements and to form his opinion as to the hostility of the witnesses on the basis of the contents of these statements even if there were no other *indicia* of hostility. He agreed with Porter C.J.O. that a new trial should be ordered.

[1] (1859), 5 C.B.N.S. 786, 28 L.J.C.P. 160.

Roach J.A. dissented. He agreed with the learned trial judge that "adverse" means "hostile" and held that he was right in deciding not to look at the statements for the purpose of forming his opinion as to whether the witnesses were hostile. He would have dismissed the appeal.

On this branch of the matter I agree with the conclusions of Roach J.A. and (subject to one reservation to be mentioned in a moment) I am so fully in agreement with his reasons that I wish simply to adopt them.

The reservation referred to is in regard to a reference made by the learned Justice of Appeal to s. 9 of the *Canada Evidence Act* in which he says:

> It will be noted that under the Canada Evidence Act a party calling a witness may not contradict by other evidence unless in the opinion of the court the witness proves adverse, while under the Ontario Act a party calling a witness may contradict him by other evidence regardless.

This observation was not necessary to his decision and does not affect it. With respect, I am of opinion that s. 9 of the *Canada Evidence Act* has been correctly construed as not restricting the right of a party calling a witness to contradict him by other evidence to cases in which in the opinion of the court the witness proves adverse.

It remains to consider whether the plaintiff discharged the burden resting upon it of satisfying the Court by a preponderance of evidence that at the time of the collision between the motor vehicles of Hanes and Woodwark which occurred shortly after 11 p.m. on May 16, 1958, Hanes was under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile.

Since the learned trial judge and all members of the Court of Appeal felt themselves bound, by the decision of this Court in *London Life Insurance Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*[1], as interpreted by the Court of Appeal in *Earnshaw v. Dominion of Canada General Insurance Co.*[2], to hold that in order to succeed the plaintiff was called upon to prove the fact of intoxication with substantially the same strictness as would have been required of the prosecution in the trial of a criminal charge it was not necessary for them to consider or decide the question set out in the preceding paragraph. However, the

[1] [1929] S.C.R. 117, 1 D.L.R. 328. [2] [1943] O.R. 385, 3 D.L.R. 163.

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learned trial judge expressed the opinion quoted in the reasons of my brother Ritchie that he would have answered the question in the affirmative; Mackay J.A. indicated the same view; Porter C.J.O. expressed no opinion; Roach J.A. would have inclined to answer the question in the negative.

Turning to the evidence it may first be observed that the only items of direct evidence of the consumption of any intoxicating liquor by Hanes on the day in question are (i) the statement made by Hanes to an adjuster employed by the plaintiff on June 3, 1958. At the time of making the statement Hanes was still in hospital. The statement was written out by the adjuster and signed by Hanes. It reads as follows:

> My name is Ralph Hanes age 58 of Prescott, Ontario. On May 16, 1958, I was buying cattle till about noon and Mr. Jack Markham of Ingersoll was with me all morning and I let him off at Daniels Hotel in Prescott at about 12 noon. I do not remember what I was doing for the rest of the day or evening of this accident, and I cannot recall whether I was driving my car at the time this accident took place or if Mr. Earl was driving at the time. Since being in the hospital Mr. Earl's father was in to see me and advised me he thought his son had been driving at the time of this accident. As mentioned above, I cannot recall anything past noon on May 16, 1958, other than having some beer in the afternoon, I cannot recall where I had it, I cannot recall having any lunch or supper that day either.

(ii) a portion of the examination for discovery of Hanes in the action of *Woodwark v. Hanes* read into the record by counsel for the plaintiff which is as follows:

> 61. Q. Where did you spend all this intervening time between 2.30 and 6 o'clock? A. It was 5 o'clock when I was at the garage at Chesterville, and left there.
>
> 62. Q. How long had you stayed in Chesterville? A. About 2 hours or better.
>
> 63. Q. Were you at the garage all the time? A. No.
>
> 64. Q. Where were you in addition to being in the garage? A. I was over at the hotel, and I was at the restaurant.
>
> 66. Q. Did you have anything to drink? A. I had one pint of beer there.

Other questions and answers read in indicate that Hanes had to some extent informed himself, as it was his duty to do, of the circumstances surrounding the accident of which he had no memory when questioned in the hospital. For example, he stated definitely that he and not Earl was driving at the time of the accident. It is not an unreasonable

supposition that the "some beer" referred to in the statement was made up of the one pint he had at the hotel in Chesterville and the one pint to be mentioned in the item next following; (iii) the witness Blanchard deposed that Hanes had one pint of beer in the hotel at Spencerville shortly before 6.30 p.m. on the day in question.

There is, therefore, no direct evidence that Hanes had consumed more than a total of two pints of beer.

There is, however, the evidence of Betty Willard, the waitress in Willard's restaurant in Spencerville regarding Hanes' appearance and actions there at about 7 p.m. on the day in question. As it is on the evidence of this witness that the opinion of the learned trial judge quoted by my brother Ritchie is largely based it seems necessary to quote all of it that touches the question whether Hanes was then intoxicated. It was all given on examination in chief and is as follows:

Q. Do you know the defendant Ralph Hanes? A. Yes.

Q. How long have you known him? A. I would say about five years.

Q. And had he from time to time been a customer in your restaurant? A. Yes.

Q. Do you recall a day when an accident occurred on the main highway between Spencerville and Kemptville involving some people by the name of Woodwark and the defendant, Mr. Hanes? A. Yes.

Q. When did you learn about this accident occurring, or that it had occurred? A. The same evening.

Q. Had you that evening you heard the accident occurred seen the defendant Ralph Hanes? A. Yes.

Q. Where had you seen him? A. In the restaurant.

Q. What were you doing in the restaurant at the time? A. I was a waitress.

Q. Waiting on your customers? A. Yes.

Q. What was Hanes doing in the restaurant? A. He came in for lunch.

Q. To eat. What time of day was it when he was in the restaurant? A. Approximately 7 o'clock.

Q. In the evening or morning? A. In the evening.

Q. And do you know how long he was in your restaurant approximately? A. Half an hour.

Q. And was there anyone with him? A. Yes.

Q. Who? A. His name?

Q. Yes? A. Mr. Earl.

Q. Jesse Earl? A. I don't know.

Q. You don't know his first name? A. No.

Q. Were there other people in the restaurant during the time Hanes was there? A. Yes, a number of people.

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Q. Are you able to say who they were? A. No, I don't remember.

Q. Did you observe the conduct of the defendant Hanes when he was in your restaurant that evening? A. Yes.

Q. Would you describe as far as you can recall it? A. I was under the impression that he had been drinking.

Q. Why? A. He was quiet.

Q. Did you speak to him? A. Yes.

Q. Did he speak to you? A. He gave me his order.

Q. What was his manner of speech? A. Not too clear.

Q. Did you observe his face and his eyes? A. Yes.

Q. What was the condition of his face and eyes? A. Well, his appearance was not very good.

Q. What was the matter with it? A. Well, it, I would say . . .

Q. Describe as best you can? A. I notice his eyes were not—did not look very good.

Q. What was wrong with them? A. Just a little hazy looking.

Q. Do you recall what he had to eat? A. Yes, I do, yes a bowl of soup he ordered.

Q. Was there anything else? A. I don't remember. I remember the soup.

Q. Why do you remember the soup? Perhaps I should ask you, did you serve anything with the soup? A. Soup and crackers.

Q. Is there any reason why you would recall this specifically? A. There was a bit of a mess on the counter when he left.

Q. A bit of a mess. If I had soup and crackers perhaps I would leave some crumbs and perhaps spill a little soup. How would the mess you referred to compare with what you would expect from the average customer? A. There were crackers around his plate and on the counter and soup had been spilled also.

Q. Did you observe him eat the soup? I am not quite sure whether you eat or drink soup? A. I beg your pardon.

Q. Did you see him consume the soup? A. No, I was busy.

Q. Did you observe anything else about his conduct? A. I remember that he became quite drowsy.

Q. Where did he sit? Did he sit? A. He was just in the door, on the first or second stool, just inside the door.

Q. At the counter? A. Yes.

Q. And you say he became quite drowsy. When, in reference to when you served him the soup? A. After he had the soup, a few minutes.

Q. What happened then? A. I would say he dozed a bit.

Q. Sitting on the stool? A. Yes.

Q. What happened to him when he dozed? Did he remain seated upright? A. Yes.

Q. What happened after that? A. I don't remember too clearly.

Q. Did you see him leave? A. I did not see him walk out, no.

Q. You saw him walk in? A. No, I was in the kitchen when he came in.

Q. Did you observe anything else about his conduct which would be other than ordinary? A. No.

* * *

Mr. HEWITT: You said you knew the defendant. Had you seen him on other occasions? A. Yes, I had.

Q. How did his appearance on the evening you have described compare with the appearance on other occasions—I do not mean on every other occasion? A. A little the worse on this occasion.

Q. A little worse in what sense? A. As far as drinking is concerned.

Q. I see.

HIS LORDSHIP: Did he come into your restaurant when he had not been drinking? A. Oh, yes.

Mr. HEWITT: I will ask you to make a comparison of the condition of the defendant on the evening the accident occurred to when you had seen him in your opinion when he had not been drinking. A. Would you repeat that?

Q. You had seen him on occasions when you had thought he was not drinking, or you felt that he had not been drinking? A. Yes.

Q. How did that condition compare with his condition on the evening of the accident as to the condition we should refer to, perhaps, as normal? A. I do not know how to answer.

Q. Are you able to answer at all? A. No, I don't think so.

HIS LORDSHIP: Whether he had been drinking or not he was always the same, is that what you are saying? He would come in and after having soup would leave crackers around, and soup, and would go to sleep? A. It did not happen very often, no. Any time he came in he pretty well behaved himself.

Mr. HEWITT: Are you suggesting on this occasion he did not pretty well behave himself? A. He was quiet.

HIS LORDSHIP: We are trying to ascertain this man's condition, having in mind the claim by the insurance company that at the time of the accident he was so intoxicated as not to be capable of driving his car. Mr. Hewitt is trying to get at what he is like when he is sober. Do you know? A. No, I just see him coming in—he used to come in the restaurant quite often.

Q. Had he always been drinking when he came in? A. No, I would not say that, not always.

Mr. HEWITT: Can you say on the night of the accident that his condition was something different than on the occasions when he was perfectly sober and had not been drinking? A. Well, that night I was under the impression that he had been drinking.

Q. I don't want to ask you how much he had had to drink, but can you put as to what extent he had been drinking in comparative terms? Do you understand? A. Well, err, well.

Q. Let me take you back to something you said, that on the night of the accident he was a little worse than on other occasions. Worse in what sense? A. There were lots of times he came in when you never thought he had been drinking or you didn't notice, but I notice on this night that he had been drinking.

The witness Dake testified that he saw Hanes in Willard's Restaurant around 7 or 7.30. His evidence continues as follows:

Q. What did you observe as to the conduct of Hanes during the time you were in the restaurant and he was in there. A. I thought he was drinking a little bit. I can't say how much.

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Q. What was there about him? What did you observe to lead you to believe that he had been drinking? A. Well, the way he acted.

Q. How did he act? A. Slumped over the counter, and he spilled his soup.

Q. He spilled his soup, how much? A. Well, not very much.

Q. You spill soup sometimes? A. Yes.

Q. How much soup did he spill in comparison to what you might spill ordinarily when eating soup? A. Not too much.

Q. What else did he do that you observed? A. Nothing else.

Q. Did you hear him speak? A. No, I can't say I did.

Q. Did you observe how—whether or not Mr. Hanes consumed the soup? A. Yes.

Q. How did he do that? A. Drinking it out of the bowl.

Q. When drinking it out of the bowl what can you say as to his position in reference to the counter? A. He was standing up.

Q. Was he standing up all the time he was in there? A. No.

Q. When did he stand up? A. He was standing up quite a while after he came in.

Q. Had he been sitting any time before he drank his soup? A. I cannot—I am not sure.

Q. Did you see him walk into or out of the restaurant? A. I saw him walk in and out.

Q. How did he walk? A. Ordinary.

Q. I beg your pardon? A. Ordinary.

Q. Anything unusual about it? A. No.

Q. Did you see him when he left the restaurant? A. Yes.

Q. Where were you then? A. I left right behind.

Q. Where did he go? A. Up towards the street, towards the hotel.

Q. What hotel? A. The Spencerville Hotel.

Q. What kind of progress did he make from the restaurant to the hotel? A. Normal.

Q. I beg your pardon? A. Normal, he walked pretty normal.

Q. He walked what? A. Normal, just ordinary. He didn't stagger or nothing.

This was all given on examination-in-chief.

The witness Piche described the conduct of two men in Willard's Restaurant at about 7 p.m. on the day in question. He could not identify either of them as being Hanes but the witness Dake was recalled and said that one of the two men described by Piche was Hanes. The evidence of Piche was as follows:

Q. What did you observe of the men while you were there? A. When they came in I was under the impression they were drinking.

HIS LORDSHIP: Q. Were drinking, or had been drinking? A. Had been drinking. They staggered a bit and made conversation with the one in the restaurant.

Mr. HEWITT: Q. What kind of conversation? A. Just friendly, sort of—I can't remember now what they said.

Q. What was their manner of speech? A. It was not as if the soberest, or as if they were the drunkest.

Q. What do you put on the limits of soberest and the drunkest? A. Well, I don't know—I don't know—they made me feel that they were drinking, that is all.

There was no evidence adduced by the plaintiff as to the condition of Hanes at any time after he left Willard's Restaurant between 7 and 8 p.m. until he was found in his car after the collision by the witness Hudson, an officer of the Ontario Provincial Police Force who had had some years experience in investigating accidents.

Hudson stated that he believed Hanes was unconscious although shortly he started yelling about the passenger in his car. Hudson said he was "right up beside him" and smelt "a faint smell of alcohol on his breath".

It was argued for the plaintiff that the evidence set out above considered with the fact that Hanes' car at the moment of collision appears to have been on the wrong side of the road was sufficient to satisfy the onus resting upon it and stress was laid on the failure of Hanes to testify.

It appears to me that the plaintiff having adduced evidence as part of its case that Hanes had no memory "past noon on May 16" has furnished an explanation of his not being called as a witness in his own defence. There is no evidence to suggest he had had anything intoxicating to drink before noon on the day in question.

In dealing with the facts the learned trial judge said:

> I find that those witnesses who testified as to his sobriety, with the exception of Markham, who had seen him earlier in the day, and whom I find to be a truthful witness, ought not to be believed.

After a careful perusal of the whole record I have some difficulty in understanding this statement. For example, one witness, the Deputy Reeve of the Township of Oxford, who had seen Hanes at 1 p.m. on the day of the accident in connection with cattle business testified to his complete sobriety at that time and was not cross-examined on this point. There is nothing in the written record to suggest that this witness was not frank and straight-forward. However, the learned trial judge had the advantage of seeing him which

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we have not and consequently I shall refer only to the evidence of Markham whom the learned trial judge found to be a truthful witness.

The significance of Markham's evidence is that, while he parted from Hanes at 11 a.m. on the day of the accident at which time Hanes had had nothing to drink, Hanes called him by long distance telephone between 8.30 and 9.00 p.m., pursuant to an agreement made during the morning, with regard to the arrangements that Hanes was to make for the picking up by trucks of the cattle which Markham had purchased. Markham said that Hanes had made these arrangements and that their long-distance conversation in which he reported on them was a normal one.

On a careful consideration of all the evidence, I have reached the conclusion that, while it might have been open to the tribunal of fact to find that at the moment he left Willard's Restaurant Hanes was under the influence of intoxicating liquor to such an extent as to be incapable of the proper control of an automobile (although I would have hesitated to find so) the evidence is insufficient to discharge the burden which rested on the plaintiff of satisfying the Court by a preponderance of evidence that at the time of the accident some four hours later Hanes was still incapable. As is pointed out by Roach J.A. the food he had consumed and the lapse of time would both have had a sobering effect; the long-distance telephone conversation with Markham indicates that between 8.30 and 9.00 p.m. Hanes was in a normal condition; there is no evidence of his having taken any more liquor after leaving the restaurant and he had none at the restaurant.

In reaching the conclusion stated above I am accepting everything said by the learned trial judge as to the credibility of the witnesses and as to the evidence which he accepted and that which he rejected. I differ from him as to the inferences which should be drawn therefrom.

I would allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the learned trial judge with costs throughout. It follows that the cross-appeal fails and should be dismissed with costs.

Appeal dismissed with costs, cross-appeal allowed with costs, CARTWRIGHT J. *dissenting.*

Solicitor for the defendant, appellant: G. William Gorrell, Morrisburg.

Solicitors for the plaintiff, respondent: Hewitt, Hewitt & Nesbitt, Ottawa.

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THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) APPELLANT;

AND

SAMUEL, SON & CO., LIMITED (*Claimant*) ..... RESPONDENT.

1962

*Nov. 21, 22

1963

Jan. 22

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Industrial building—Value to owner—Market value of land—Reproduction cost of building less depreciation.

The respondent company was the owner of an industrial building on a site of 1.46 acres in Toronto; the building had been built and later extended for the special purposes of the respondent's business. This property was expropriated by the municipality and the respondent was awarded $1,449,310 by the arbitrator. By a unanimous judgment of the Court of Appeal the award was fixed at $1,303,555. There were concurrent findings of the arbitrator and the Court of Appeal that the market value of the land alone was $423,555. Both parties agreed that the reproduction cost of the building was $640,000. The only difference between the arbitrator and the Court of Appeal was that the arbitrator deducted $46,000 for depreciation against a deduction of $60,000 by the Court of Appeal. There was no dispute about the valuation at $100,000 of certain equipment that could not be removed. The Court of Appeal made no change in an allowance of $200,000 for disturbance, moving expenses and other miscellaneous items. Ten per cent additional allowance for compulsory taking had been awarded by the arbitrator before the decision in *Drew v. The Queen*, [1961] S.C.R. 614, and, of necessity, had to be disallowed by the Court of Appeal.

The municipality claimed that the award should be set aside, and submitted an alternative mode of valuation based upon a comparison between market value and re-establishment cost as ascertained at the date of the arbitration.

Held: The appeal should be dismissed.

The submissions of the municipality were rejected. There was no error either of fact or principle in the reasons of the Court of Appeal. In determining value to the owner in this case, it was correct to take into account the market value of the land plus the reproduction cost of the building, less depreciation. *Woods Manufacturing Co. Ltd. v. The*

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Abbott and Judson JJ.

1963

MUNICIPALITY OF METROPOLITAN TORONTO v. SAMUEL, SON & CO., LTD.

King, [1951] S.C.R. 504; *Irving Oil Co. Ltd. v. The King*, [1946] S.C.R. 551; *Diggon-Hibben Ltd. v. The King*, [1949] S.C.R. 712; *Assaf v. The City of Toronto*, [1953] O.R. 595, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], varying an award of compensation by an arbitrator. Appeal dismissed.

R. F. Wilson, Q.C., and *A. P. G. Joy, Q.C.*, for the contestant, appellant.

B. W. Grossberg, Q.C., and *H. J. Bliss*, for the claimant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The municipality appeals from a unanimous judgment of the Court of Appeal[1] which awarded the respondent, Samuel, Son & Co., Limited, $1,303,555 for the expropriation of its property. The arbitrator had awarded $1,449,310. The municipality claims here that the award should be set aside.

The respondent was the owner of an industrial building at the southwest corner of Spadina Avenue and Lakeshore Road in Toronto. The frontage on Lakeshore Road was 597 feet, $5\frac{1}{4}$ inches with a depth of 143 feet on Spadina Avenue. The total area of the site was 1.46 acres. There are concurrent findings of the arbitrator and the Court of Appeal that the market value of the land alone was $423,555. The following table shows the arbitrator's award as varied by the Court of Appeal:

Arbitrator's Award			*Court of Appeal*		
Market value of land		$ 423,555			$ 423,555
Buildings—Reproduction cost (agreed)	$ 640,000			$ 640,000	
Depreciation	46,000	594,000	Depreciation	60,000	580,000
Crane Equipment (agreed)		100,000			100,000
Additional allowance, disturbance, moving, etc.		200,000			200,000
		$ 1,317,555			
10% additional allowance		131,755			nil
TOTAL		$ 1,449,310			$ 1,303,555

With the concurrent findings of the arbitrator and the Court of Appeal there can be no question that the valuation of the land is unassailable in this Court. The same applies

[1] [1962] O.R. 463, 32 D.L.R. (2d) 620.

to the reproduction cost of the building. Both parties agreed that it was $640,000. The only difference between the arbitrator and the Court of Appeal was that the arbitrator deducted $46,000 for depreciation against a deduction of $60,000 by the Court of Appeal. There was a wide difference among the experts on the amount of depreciation which should be deducted. In the Court of Appeal the municipality had urged that the depreciation of $60,000 given by one of the experts should be accepted. The Court of Appeal did no more than give effect to that submission.

In my opinion both the arbitrator and the Court of Appeal were right in adopting the principle of reproduction cost less depreciation in determining the value of this building, which was built in 1929 and extended in 1949 for the special purposes of the respondent's business.

There is no dispute about the valuation of the crane equipment at $100,000 which was so constructed that it became part of the building and could not be dismantled, removed and reassembled in a new building.

The next item is one of $200,000 for an additional allowance for disturbance, moving expenses and other miscellaneous items. The Court of Appeal made no change in this allowance. There was ample evidence to support this branch of the award. The moving cost alone was $105,239.07. Loss of profit in the interval before the re-establishment of the business in the new location, loss due to dislocation of business, loss of the advertising value of the old location, which was considerable, and other items of loss on which evidence is given, fully justify the difference between the actual disbursements of moving and the award of $200,000. Counsel for the respondent said that $200,000 was a minimum figure and I am inclined to agree with him.

The last item was the 10 per cent additional allowance. This was awarded before the decision of this Court in *Drew v. The Queen*[1] and, of necessity, had to be disallowed by the Court of Appeal.

After this survey, it is apparent that the only difference between the award of the arbitrator and that of the Court of Appeal was this 10 per cent additional allowance and $14,000 additional depreciation deducted by the Court of Appeal, making a total of $145,755.

[1] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.

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Judson J.

I can see no error either of fact or principle in the reasons of the Court of Appeal. In determining value to the owner in this case, it was correct to take into account the market value of the land plus the reproduction cost of the building, less depreciation. This was done in *Woods Manufacturing Co. Ltd. v. The King*[1]; *Irving Oil Co. Ltd. v. The King*[2]; *Diggon-Hibben Ltd. v. The King*[3]; *Assaf v. The City of Toronto*[4].

The municipality submitted in this Court an alternative mode of valuation based upon a comparison between market value and re-establishment cost which had been ascertained at the date of the arbitration. The argument is built up in this way:

Market value, land and buildings	$650.000.00
Crane	100,000.00
Moving expense etc.	126,495.18
	$876,495.18

The moving expense includes not only the actual disbursements of $105,239.07 mentioned above but also additional items for loss of executive time, cost of advertising and cost of removing a railway siding, which, altogether, produced the sum of $126,495.18. The ascertained re-establishment cost was $903,195.18, made up as follows:

Cost of Land (7 acres)	$ 31,500.00
Cost of Building	745,200.00
Cost of Moving	126,495.18
	$903,195 18

The valuation in the first table is fairly close to the re-establishment cost. The difference between the re-establishment cost and the award of the Court of Appeal is the sum of $400,359.82 which the municipality says must be attributable to savings and anticipated profits which the respondent would have hoped to make by continued use of the expropriated property and that there is no basis for the award of any such sum.

The respondent's answer, which, in my opinion, is correct, is that it would be error to start with this assessment on the basis of market value of land and buildings and that this would be a repetition of the error which was corrected in

[1][1951] S.C.R. 504, 2 D.L.R. 465, 67 C.R.T.C. 87.
[2][1946] S.C.R. 551, 4 D.L.R. 625.
[3][1949] S.C.R. 712, 4 D.L.R. 785.
[4][1953] O.R. 595, 4 D.L.R. 466.

this Court in *Woods Manufacturing*. He also submits that re-establishment cost is irrelevant and affords no guide to the assessment of compensation.

As to market value, the Court of Appeal pointed out that this was a special purpose building built for the purpose of fabricating steel to the special requirements of the respondent's business. The respondent's business had been in operation for 100 years and operating at this site since the year 1929. The expert evidence on which the market value of $650,000 for the land and building is based is no more than this: that to sell the property it would be necessary to find a purchaser who could use it for the same type of business and that if such a purchaser could be found he would advise him to pay at the rate of $10 a square foot for land and building, approximately $650,000 in all. He called this a rule of thumb market value. It can afford no guidance in the assessment of value to the owner on the facts of this case.

There is error, also, in the municipality's submission that re-establishment cost can guide one to an assessment of value to the owner in this case. The re-establishment cost as calculated above was $903,195.18. The error in this submission is that the cost of the land at the new location was only $31,500. The market value of the land at the old location was $423,555. What the company acquired was land worth $31,500 as contrasted with $423,555 at the old site and a more expensive and presumably more modern building but widely separated from the old site of business. I agree with the submission of the respondent that re-establishment cost, on the facts of this case, is of no assistance to the appellant's case.

There is no error in the reasons of the Court of Appeal. I agree with them in their entirety and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the contestant, appellant: C. Frank Moore, Toronto.

Solicitors for the claimant, respondent: Levinter, Grossberg, Shapiro & Dryden, Toronto.

64202-5—4½

1962
*Dec. 3
1963
Jan. 22

EMILY JANE McCORMACK (*Plaintiff*) ..APPELLANT;

AND

T. EATON COMPANY LIMITED (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trial—Injuries received in fall on escalator—Action for damages—Questions submitted to jury—Supplementary charges, questions and suggestions—Jurymen confused—New trial directed.

The plaintiff, while shopping in the defendant's department store, stepped on an old-fashioned type of escalator. The heel of her shoe stuck in the tread and while trying to extract it as the escalator was descending, she twisted her body to get her foot from the shoe. She finally succeeded in pulling her foot free but immediately fell backwards to the bottom of the escalator and was injured.

An action was brought and during the trial seven questions as agreed upon were submitted to the jury. The first question, answered in the affirmative, was: "Were the injuries to the plaintiff caused by an unusual danger on the defendant's escalator of which the defendant knew or ought to have known?" In the second question the jury was asked, if the answer to question 1 was "yes", to state fully in what such danger consisted. The answer, based on an exhibit of a sample cleat, stated that it was possible for the cleats to work loose. The trial judge, having asked the jury to retire, said to counsel that the answer to the questions seemed to be inconclusive. The jury was recalled and instructed to return to the jury-room and "if you can, say what the danger was". If they could not, they were to change the answer to the first question to "no", which in the event was done. Subsequently, the jury was reinstructed several times with regard to question 3: "Did the defendant take reasonable care by notice or otherwise to prevent such injury?" It was finally agreed that an answer was not required.

The judgment of the trial judge dismissing the action was affirmed by the Court of Appeal. An appeal *in forma pauperis* was brought to this Court. No question arose as to the amount of damages; the only question raised was one of liability.

Held: (Judson J. dissenting): The appeal should be allowed and a new trial directed limited to the question of liability.

Per Kerwin C.J. and Taschereau, Cartwright and Fauteux JJ.: The jurymen were confused by the various supplementary charges, questions and suggestions put to them by the trial judge. The trial and its result were so unsatisfactory that the verdict could not stand. *Dozois v. Pure Spring Co. Ltd. and Ottawa Gas Co.*, [1935] S.C.R. 319, followed; *Herd v. Terkuc*, [1960] S.C.R. 602, referred to.

Per Judson J., *dissenting:* When the jury answered the first question affirmatively, they supported their finding with a reason which could not be founded on any evidence that they had heard. Their finding

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Judson JJ.

was not one of fault. In the circumstances, the trial judge, who had already instructed the jury on fact and law, had the power and the duty to instruct the jury to reconsider the answer to question 2. On reconsideration, they found that there was no unusual danger. This was the correct finding on the evidence. Having answered question 1 in the negative, there was no answer required for questions 2 and 3. There was no impropriety in the subsequent discussion of these points in the presence of the jury.

APPEAL *in forma pauperis* from a judgment of the Court of Appeal for Ontario, affirming a judgment of McLennan J. Appeal allowed, Judson J. dissenting.

P. B. C. Pepper, Q.C., for the plaintiff, appellant.

B. J. Thomson, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and Taschereau, Cartwright and Fauteux JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal *in forma pauperis* by the plaintiff in the action, Emily Jane McCormack, from a decision of the Court of Appeal for Ontario which without recorded reasons affirmed the judgment at the trial of the Honourable Mr. Justice McLennan dismissing the action.

The appellant was shopping in the department store of the respondent on August 22, 1956. She stepped on an old-fashioned type of escalator no longer in service to descend to the basement. The heel of her shoe stuck in the tread and while trying to extract it as the escalator was descending, she twisted her body to get her foot from the shoe which had a strap across it. The heel was an ordinary one. She finally succeeded in pulling her foot from the shoe but immediately fell backwards to the bottom of the escalator and was injured. No question arises as to the amount of damages, but, as we are of opinion that a new trial should be had on the question of liability, all reference is omitted to the proceedings at the trial except such as is necessary to indicate the reasons for our conclusion.

The action was tried with a jury and the questions to be submitted had been agreed upon. These questions and the answers, which the jury first brought in, are as follows:

1. Were the injuries to the Plaintiff caused by an unusual danger on the Defendant's escalator of which the Defendant knew or ought to have known?

Answer: "Yes"

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Kerwin C.J.

2. If your answer to question No. 1 is "Yes", then state fully in what such danger consisted.

Answer: "On Exhibit 16, the sample of the cleat shown, we find non-slip material on sides and bottom of the cleat which is mortised into the bottom plate, proving in our opinion that it is possible for these cleats to work loose."

3. Did the Defendant take reasonable care by notice or otherwise to prevent such injury?

Answer: "No"

4. Did the Plaintiff use reasonable care for her own safety?

Answer: "Yes"

5. If your answer to question No. 4 is "No" wherein did she fail to use reasonable care?

(No Answer)

6. If your answers to questions 3 and 4 are "No" state in percentages the degree of fault attributable to each.

(No Answer)

7. Irrespective of how you answer the other questions, at what amount do you assess the Plaintiff's damages?

Answer: $10,500.00.

Counsel for neither party desired to have the jury retained but the trial judge nevertheless asked them to retire and he then considered with counsel the answer to Question 2. When the jury had again retired, the trial judge stated to counsel that the answer to the questions seemed to be inconclusive. After some considerable further discussion the jury was recalled and instructed by His Lordship to return to the jury-room and "if you can, say what the danger was". He added:

I am going to return these answers to you and I have put at the bottom of the sheet 'No. 2(*a*)'. I want you, if you can, to answer that question as to what the danger was and not your reasons for it. If you cannot, then don't answer it and change the answer to the first question to 'No'.

Is that clear?

FOREMAN: Yes, my lord.

Court adjourned for twenty minutes when the jury returned and the following occurred:

REGISTRAR: Gentlemen of the jury, have you agreed upon your verdict?

FOREMAN: We have.

HIS LORDSHIP: Gentlemen, you have changed your answer to Question 1 from 'Yes' to 'No'. So that means that presumably Question 3 remains as 'No'. I should have put that to you before. That is, did the defendant take reasonable care by notice or otherwise to prevent such injury.

FOREMAN: My lord, we decided if you wanted that question changed we agreed that it should be changed to 'Yes'.

A JUROR: No.

FOREMAN: Pardon me. Somebody disagrees with me.

HIS LORDSHIP: I think perhaps then, gentlemen, I must send you back again. I think that is the only right thing to do. On the basis of these questions, if your answer to Question No. 1 is 'Yes', then the next (sic) question: 'Did the defendant take reasonable care by notice or otherwise to prevent such injury?' Your answer to that was 'No.'. But you have changed the answer to Question No. 1 to 'No', so Question No. 3 does not arise, presumably. However, that is the way it is. So I invite you now to retire to your jury room. It must follow logically, gentlemen, that that is the way.

The jury retired and the following discussion occurred between His Lordship and counsel:

HIS LORDSHIP: I think we might wait for a few moments, gentlemen. I wouldn't expect the jury to be long. Did I make it sufficiently clear to them that their answer to No. 1 being 'Yes', their—

MR. THOMSON: If the answer to Question is is 'No'—I beg your pardon. Were the injuries caused by an unusual danger? They have changed that to 'No'.

HIS LORDSHIP: Then 3 does not arise at all.

MR. THOMSON: That's right. I didn't understand that your lordship was telling them that they should perhaps strike out their answer to 3, if that is what your lordship—

HIS LORDSHIP: That is what I intended to say. Perhaps I didn't say it aptly.

MR. THOMSON: I think you said that the answers should be consistent.

HIS LORDSHIP: Perhaps I should call them back once more.

Whereupon the jury was again recalled and the following occurred:

HIS LORDSHIP: Gentlemen, I come back to Question No. 3: 'If your answer to Question 1 is "Yes", then did the defendant take reasonable care by notice or otherwise to prevent such injury?' Now, if your answer to Question No. 1 is now 'No', you need not answer Question 3. So my suggestion would be that you strike out the word 'No' in answer to Question 3. But I think you will have to do it by agreement. Is it all agreed between you?

SOME JURORS: Yes.

HIS LORDSHIP: It is?

A JUROR: It seems logical.

HIS LORDSHIP: You see, you really don't need to answer that question. I wanted the verdict clear. That is your verdict, is it, gentlemen?

SOME JURORS: Yes.

The trial judge thereupon granted the motion of counsel for the respondent that the action be dismissed with costs.

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Kerwin C.J.

In *Dozois v. The Pure Spring Company Limited and The Ottawa Gas Company*[1], a new trial was directed by this Court because it was found that the trial and its result were so unsatisfactory that the verdict should not stand and there should be a new trial. In the present case we are of opinion that the jurymen were confused by the various supplementary charges, questions and suggestions put to them by the trial judge and that there was that kind of error referred to in *Dozois*. While in *Herd v. Terkuc*[2] it was held that the course there followed by the trial judge was a proper one, it was pointed out at p. 606 that the power to tell the jury to reconsider their verdict is not one to be used lightly.

The appeal is therefore allowed, the judgment of the Court of Appeal and the judgment at the trial set aside and a new trial directed limited to the question of liability. The appellant is entitled to her costs in the Court of Appeal and also in this Court, but, as to the latter, by our Rule 142(4), she will have only her out-of-pocket expenses and three-eighths of the usual professional charges under the other items of the tariff including the application upon which leave to appeal *in forma pauperis* was granted. The costs of the first trial will be disposed of by the Justice presiding at the new trial.

JUDSON J. (*dissenting*):—In my respectful opinion, which is contrary to that of the majority of the Court, I would not send this case back for a new trial but would dismiss the appeal.

When the jury said that there was an unusual danger of which the defendant knew or ought to have known, they supported their finding with a reason which could not be founded on any evidence that they had heard. They said that it was possible for a cleat to work loose because a particular exhibit had non-slip material at the bottom and on its sides. This exhibit was produced as a specimen cleat and there was no evidence whatever from which they could infer that it had ever been attached to the elevator or any elevator. Their finding was not one of fault.

It is apparent from what took place when the jury returned with these two answers that counsel for the defendant was not going to urge that they be sent back.

[1] [1935] S.C.R. 319, 3 D.L.R. 384.
[2] [1960] S.C.R. 602, 24 D.L.R. (2d) 360.

He was satisfied that their answers did not constitute a finding against his client. Counsel for the plaintiff did not ask to have the jury sent back. He may well have thought that he had the maximum finding in his client's favour. In these circumstances, the trial judge, who had already adequately instructed the jury on fact and law, had the power and the duty to instruct the jury to reconsider the answer to question 2. He was merely telling them to face the issues. He asked them to find whether there was a worn cleat or a loose cleat. It was in this way that the case had been originally put to them. When they were told that they must do one thing or the other, they came back with a clear answer which denied liability. They found that there was no unusual danger which, in my opinion, was the correct finding on the evidence. Having answered the first question in the negative, there was no answer required for questions 2 and 3. There was no impropriety in the subsequent discussion of these points in the presence of the jury. There should not be a new trial on this ground.

Following *Herd v. Terkuc*[1], the power of the learned trial judge is unquestionable. If he had waited for a motion for judgment he might well have dismissed the action on the questions as first answered. I think, with respect, that he followed the better course in sending the jury back.

Appeal allowed with costs and a new trial directed limited to the question of liability, JUDSON J. *dissenting.*

Solicitor for the plaintiff, appellant: Raymond L. Brawley, Toronto.

Solicitors for the defendant, respondent: Haines, Thomson, Rogers, Howie & Freeman, Toronto.

[1] [1960] S.C.R. 602, 24 D.L.R. (2d) 360.

1962
*Dec. 14

JEAN ROBITAILLE (*Plaintiff*) .....APPELLANT;

AND

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Jan. 22

LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC (*Defendant*).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Motor vehicles—Car hitting cement block on shoulder of highway—Block at 4½ feet from paved portion—Driver killed—No eye witnesses—Whether liability of Roads Department.

While driving with his wife on a provincial highway on a short trip, the plaintiff's car, driven by his wife who was an experienced and licensed driver, struck a cubical cement block measuring 2½ feet to 3 feet and weighing 2,400 pounds, which had been standing for a number of years on the right hand shoulder of the road at a distance of 4½ feet from the paved portion of the highway. The weather was fine and the pavement dry. At the time the plaintiff was leaning back in his seat and had closed his eyes but was not asleep. He estimated the speed of the car at no more than thirty miles per hour. His wife was instantly killed and he was seriously injured. There were no eye-witnesses. All that can be deduced from the physical facts is that while going down a slight grade and rounding a somewhat pronounced curve to the left at a speed in the neighbourhood of 50 miles per hour, the automobile left the pavement, proceeded on the shoulder for 45 feet and was turning to regain the pavement when it struck the cement block. The trial judge maintained the action, but this judgment was reversed by the Court of Queen's Bench. The plaintiff appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be dismissed.

Per Taschereau, Abbott, Martland and Ritchie JJ: There is no provincial statute which requires the Quebec Roads Department to provide roads under its control with a shoulder of any particular width or of any particular character. A motorist venturing on to such shoulder should proceed slowly and with care. At the time of the accident the appellant's car was well off the paved portion of the highway and was travelling at a speed which in the light of what happened must have been at least 50 miles per hour. This excessive speed was the real cause of the accident. There was no explanation as to why the car was being driven at such speed on the shoulder of the road. The plaintiff has failed to establish fault on the part of the defendant.

Per Cartwright J., *dissenting:* The evidence did not support a finding that the accident was caused by the negligence of the appellant's wife. Negligence is not presumed. All the known circumstances were more consistent with the absence of negligence than with its presence. Although the speed was not definitely ascertained, it was not in excess of 50 miles per hour which was a lawful one on this highway. There was nothing to suggest that any harm would have been caused by the manner in which the car was driven had it not been for the

*PRESENT: Taschereau, Cartwright, Abbott, Martland and Ritchie JJ.

presence of the cement block. The cement block was so situated that an automobile proceeding on the shoulder must inevitably strike it unless the driver should see it in time to stop or turn. It was at a point on the highway where it was the right, and might at times be the duty, of the driver of an automobile to proceed. It constituted a grave and obvious danger which it was the duty of the defendant to remove, and its presence rendered the defendant guilty of actionable fault.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Cliche, J. Appeal dismissed, Cartwright J. dissenting.

Jean L. Peloquin, for the plaintiff, appellant.

Leonce Coté, Q.C., and *Yves Forest, Q.C.,* for the defendant, respondent.

The judgment of Taschereau, Abbott, Martland and Ritchie JJ. was delivered by

ABBOTT J.:—The facts leading up to the tragic accident, in which appellant's wife was killed, are fully set out in the reasons of my brother Cartwright and I need not repeat them. In their essential details they are not in dispute.

The record shows that at the place where the accident happened, the Stanstead-Sherbrooke Highway (the paved portion of which is 22 feet wide) makes a wide sweeping curve to the left looking toward Sherbrooke, and at that point is virtually level. The shoulder, on the side on which the appellant's car left the travelled portion of the highway, slopes gently towards a shallow ditch and is partly gravelled, partly grass-covered.

It is clear that at the time of the accident appellant's car was completely off the paved portion of the highway. A block of cement weighing 2,400 lbs. was thrown a distance of some 60 feet from the point of impact, after which the appellant's car, continuing on, struck and broke a telephone pole. It was established that this block of cement, in the form of a cube about $2\frac{1}{2}$ feet square, was located at a distance of $4\frac{1}{2}$ feet from the paved portion of the highway on the grass covered portion of the shoulder.

There is no provincial statute which requires the Quebec Roads Department to provide roads under its control with a shoulder of any particular width, or of any particular character and it is common knowledge that, in

[1] [1962] Que. Q.B. 545.

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ROBITAILLE v. PROCUREUR GÉNÉRAL DE QUÉBEC

Abbott J.

fact, on roads in the province such shoulders vary appreciably both as to width and as to character, depending in most cases upon the nature of the terrain.

In places where the shoulder of a road is appropriate for that purpose, it can be used for parking or in case of emergency may be driven along, but in either case, I share the view expressed in the Court[1] below that a motorist venturing on to such shoulder is obliged to proceed slowly and with care.

At the time of the accident, appellant's car was well off the paved portion of the highway and was travelling at a speed which—on the evidence of the witness Côté and in the light of what happened—must have been at least fifty miles per hour.

In my opinion this excessive speed was the real cause of this unfortunate accident. Appellant was dozing at the time, his wife was killed, there were no eye witnesses and therefore no explanation as to why the car was being driven at such speed on the shoulder of the road. The Court below found unanimously that appellant failed to establish fault on the part of respondent and I am in agreement with that finding.

I would dismiss the appeal with costs.

CARTWRIGHT J. *(dissenting)*:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1] which reversed the judgment of Cliche J. and dismissed the appellant's action.

Cliche J. had given judgment for the appellant personally for the sum of $10,088.80 and as tutor for his infant children for the sum of $2,900 for the child Michelle Robitaille and for the sum of $2,100 for the child France Robitaille. As to these last two items counsel for the appellant asks for leave to appeal.

On June 24, 1958, the appellant and his wife were driving in his automobile from Rock Island to Sherbrooke on provincial highway number 5. The distance between these places is about 35 miles. At the commencement of their journey which was at about 10.30 p.m. the appellant was driving but after a time at his wife's suggestion he allowed

[1] [1962] Que. Q.B. 545.

her to drive. He said he was glad to do this as he was tired. The wife was an experienced and licensed driver. The weather was fine and the pavement dry. The appellant leaned back in his seat and closed his eyes but did not fall asleep. At a point close to the junction of the Waterville Road with highway number 5 he heard sounds suggesting to him that the car had left the paved portion of the highway. His impression was that the car was proceeding at not more than 30 miles per hour. He lifted his head but had no time to see anything. He recovered consciousness in the hospital the following morning.

No eye-witnesses of the accident were called to give evidence but, subject to a question as to the speed of the automobile, what actually occurred is established by marks on the surface of the shoulder and the physical facts.

On the south-easterly shoulder of highway number 5, that is on the right-hand side as the automobile in question was being driven, there stood a block of cement cubical in shape measuring $2\frac{1}{2}$ to 3 feet and its weight being about 2400 lbs. The distance from the edge of the paved portion of the highway to the nearest part of this cement block was $4\frac{1}{2}$ feet. It had been in that position for a number of years. The appellant's automobile struck the block of cement with the result that his wife was instantly killed, he seriously injured and the automobile demolished.

The evidence of a witness called by the respondent, traffic officer Daigle who investigated the accident and made a number of measurements, was accepted by the learned trial judge and is of importance. He testified that there were tire marks made by the automobile shewing that it was driven for 45 feet with all four wheels on the shoulder of the road up to the point where it struck the cement block and that these tire marks before reaching the spot where the block was were curving slightly to the left indicating that the automobile was being turned back towards the paved portion of the highway. As to the condition of the shoulder this witness said:

Q. Alors, le terrain sur lequel cette automobile-là a circulé, est-ce que le terrain n'était pas à peu près au même niveau que la surface pavée? R. Elle pouvait l'être, mais peut-être un peu plus bas.

Q. Combien? Un pouce (1")? R. Un pouce (1").

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Cartwright J.

Q. Alors, il n'y avait pas de différence substantielle entre l'endroit ou l'automobile a circulé et la route pavée? R. Non, la seule différence qu'il y a, c'est un peu plus bas.

Q. Et s'il y avait un fossé, il serait encore à droite de la machine? R. Si vous voulez appeler un vrai fossé plus creux, ç'aurait été à droite du chemin.

Q. Alors, cette automobile-là ne circulait pas dans ce qui était un fossé mais sur la route pavée ou substantiellement au même niveau que la route pavée? R. Ou presque.

This witness also testified, as indeed seems obvious, that had it been necessary for the driver of the automobile to leave the paved portion of the highway the place in which it was being driven up to the point of striking the block was a proper one. His measurements shewed that the cement block had been moved 60 feet by the impact, that the automobile had continued 45 feet from the point of impact with the block and had come to rest against a telephone pole which it struck and broke.

The paved portion of the highway opposite the block was 22 feet in width; the condition of the surface on the right-hand side of the paved portion has been described above. The inference to be drawn from all the evidence of the witness Daigle is that but for the presence of the cement block the automobile would have regained the paved surface of the highway and proceeded on its way without mishap.

The plan of the highway filed as an exhibit indicates that at and approaching the point of the accident the highway, as one goes towards Sherbrooke, was sloping slightly downwards and curving pronouncedly to the left.

Two questions present themselves (i) at what rate of speed was the automobile being driven, and (ii) for what reason was it driven off the paved portion of the highway.

On the first question the evidence of the appellant places the rate of speed at about 30 miles per hour. The respondent's witness, the engineer Côté, as a result of calculations from the distance the cement block was driven expressed the opinion that the rate of speed was about 50 miles an hour. If one takes the higher of these estimates the rate of speed was a lawful one on this highway.

The second question is more difficult. All that is known is that while going down a slight grade and rounding a somewhat pronounced curve to the left at a speed not

definitely ascertained but not in excess of 50 miles per hour, the automobile did leave the pavement, proceeded on the shoulder for 45 feet and was turning to regain the pavement when it struck the cement block.

All the learned Judges of the Court of Queen's Bench were of the opinion that the circumstances of the case put the appellant in the position of having to offer a satisfactory explanation of the happening of the accident, that he had failed to do this and that this necessitated a finding that the negligence of the wife of the appellant was the sole cause of the accident. In reaching this conclusion they purported to apply the principle succinctly stated by my brother Taschereau in *Parent v. Lapointe*[1]:

> . . . . Quand, dans le cours normal des choses, un événement ne doit pas se produire, mais arrive tout de même, et cause un dommage à autrui, et quand il est évident qu'il ne serait pas arrivé s'il n'y avait pas eu de négligence, alors, c'est à l'auteur de ce fait à démontrer qu'il y a une cause étrangère, dont il ne peut être tenu responsable et qui est la source de ce dommage. Si celui qui avait le contrôle de la chose réussit à établir à la satisfaction de la Cour, l'existence du fait extrinsèque, il aura droit au bénéfice de l'exonération.

The principle is not questioned, but I agree with the submission of counsel for the appellant that in the case at bar the circumstances established in evidence do not call for its application.

In *Parent's* case the car which the defendant was driving while his passengers were asleep left the road and after turning over several times came to rest in a field about 50 feet from the highway. That these facts called for an explanation is not questioned.

In the case at bar there is nothing to suggest that any harm would have been caused by the manner in which the car was driven had it not been for the presence of the cement block. The car would presumably have returned to the paved portion of the road and continued without incident. Driving on the shoulder of the highway is not *per se* either negligent or unlawful. There are times when it is the duty of a driver to do so.

[1] [1952] 1 S.C.R. 376 at 381.

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Cartwright J.

There are a number of possibilities; an approaching car passing another car may have caused the driver of the appellant's car to turn onto the shoulder to avoid a collision; it may be that, as suggested in the defence of the respondent, "elle fut aveuglée dans la courbe par les lumières d'un véhicule circulant en sens inverse" and so failed momentarily to realize the sharpness of the curve in the highway. In neither of these supposed cases would she have been guilty of negligence. She might have fallen asleep, which would have been negligent, but this seems unlikely as the journey was a short one and she herself had been driving for only a few miles. Negligence is not presumed; it may, of course, be proved by circumstantial evidence as well as by direct evidence; but in my opinion all the known circumstances are more consistent with the absence of negligence on the part of the driver of the appellant's automobile than with its presence. I have reached the conclusion that the finding of the Court of Queen's Bench that the accident was caused by the negligence of the appellant's wife is not supported by the evidence and should be set aside.

It remains to consider whether the respondent was guilty of actionable fault. As to this I agree with the conclusion of the learned trial judge and I am in substantial agreement with his reasons but as I am differing from the view of the Court of Queen's Bench I will state my reasons briefly in my own words.

The block of cement had been in the position in which it was when struck by the appellant's automobile for a number of years. Its size and position have already been described. Its colour was such that it would not be readily visible at night. It was so situated that an automobile proceeding on the shoulder with its left-hand wheels just off the paved portion of the highway must inevitably strike it unless the driver saw it in time to stop or turn. It was at a point on the highway where it was the right, and might at times be the duty, of the driver of an automobile to proceed. It constituted a grave and obvious danger which it was the duty of the respondent to remove.

Article 35 of Chapter 141 of the Revised Statutes of Québec (1941) provides as follows:

35. Work necessary for the maintenance and repair of provincial highways, regional highways or improved roads, means: . . .

3. The maintenance and repair of shoulders.

I agree with and wish to adopt the following passage in the reasons of the learned trial judge:

La preuve n'établit pas pourquoi l'épouse défunte du Requérant a conduit le véhicule qui les transportait sur l'accotement de la route à ce moment. Comme dit l'ingénieur Côté dans son témoignage, l'accotement du chemin est lui-même une surface de roulement. 'C'est une de ses fonctions' dit-il 'd'y recevoir les véhicules en cas d'urgence pour y rouler ou y stationner.' Bien que la Cour ne sache pas pourquoi le véhicule a circulé sur l'accotement à ce moment, il reste que c'était son droit d'y circuler en cas d'urgence et d'y trouver une surface de roulement dépourvue d'obstacle semblable.

Après avoir considéré la preuve dans son ensemble, la Cour arrive à la conclusion que cet accident et les dommages qui en sont résultés ont été causés uniquement par la faute des préposés à l'entretien de cette route nationale, dont l'Intimé est responsable, pour avoir laissé subsister, durant de nombreuses années, cette obstruction dangereuse sur la surface de roulement d'urgence qui présentait l'accotement de la route à cet endroit et sur lequel le véhicule concerné, en cette occasion, a percuté, causant la mort de l'épouse du requérant, les blessures graves de ce dernier et le bris de son véhicule.

The assessment of damages made by the learned trial judge was not attacked.

I would grant the application for leave to appeal as to the sums awarded by the learned trial judge for the infants Michelle Robitaille and France Robitaille. I would allow the appeal, set aside the judgment of the Court of Queen's Bench and restore the judgment of the learned trial judge with costs throughout.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Attorneys for the plaintiff, appellant: Blanchette, Péloquin & Roberge, Sherbrooke.

Attorney for the defendant, respondent: L. Côté, Sherbrooke.

1962
*Nov. 5, 6
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HER MAJESTY THE QUEEN (*Plaintiff*) ..... APPELLANT;

AND

POUDRIER ET BOULET LIMITÉE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Crown—Servant—Soldier injured while on leave—Action by Crown to recover for loss of services and medical and hospital expenses—Whether defendant negligent—Civil Code, art. 1053.

While on leave and working for the defendant in the Province of Quebec, a member of Her Majesty's Forces was injured. He was treated in a civilian hospital until his leave expired. After his return to his unit, he required further medical care and hospitalization. The Crown sought to recover the medical expenses and pay allowances from the defendant on the ground that the injury had resulted from the negligence of the defendant. The action was dismissed by the Exchequer Court. The Crown appealed to this Court.

Held: The appeal should be dismissed.

The evidence was sufficient to support the trial judge's finding that the Crown had failed to establish the defendant's negligence under art. 1053 of the *Civil Code*.

Appeal from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], dismissing an action for damages suffered by the Crown. Appeal dismissed.

R. Bédard, Q.C., and *R. Boudreau*, for the plaintiff, appellant.

J. Millar, Q.C., and *O. Frenette*, for the defendant, respondent.

The judgment of the Court was delivered by:

ABBOTT J.:—Le 2 août 1954, Raymond Bérubé, alors membre des Forces Armées du Canada, était en congé de trente jours. Il vint solliciter un emploi de journalier de l'intimée, dont il connaissait l'un des contremaîtres, Gérard Lemieux, pour qui il avait déjà travaillé.

Il fut embauché suivant un contrat d'engagement intervenu selon les règles ordinaires.

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

[1] [1960] Ex. C.R. 261.

L'employeur, couvert par la Commission des Accidents du Travail de Québec, a commencé à payer les cotisations pour ce nouvel employé, dont le nom apparaît sur sa feuille de paie.

Le 3 août 1954, Bérubé fut affecté, avec d'autres journaliers au creusage d'une tranchée à Charlesbourg, près de Québec. Ce fossé devait recevoir un drain agricole de six pouces de diamètre, devait être de trois cent cinquante pieds de longueur, de quatre pieds de largeur au sommet, de deux pieds à la base, et avoir une profondeur de six à huit pieds.

Bérubé connaissait ce genre de travail puisqu'il avait travaillé en 1951 pour Lemieux, contremaître de l'intimée, pour le creusage d'une tranchée. Le 12 août 1954, Bérubé, alors qu'il était à creuser à quatre pieds et demi, fut recouvert par un amas de terre éboulée et subit une fracture du tibia gauche.

La victime fut alors hospitalisée à l'Hôpital St-François d'Assise et y demeura jusqu'au 2 septembre 1954 alors que, sa permission expirée, il regagna son régiment.

A cette date, les frais d'hospitalisation et les frais médicaux furent acquittés par la Commission des Accidents du Travail de Québec, soit $382. La Commission paya à la victime $136.36 à titre d'incapacité totale temporaire pour la période du 13 août au 9 septembre 1954, se basant sur un taux de 7 pour cent et paya, à titre d'incapacité partielle permanente, la somme de $1,922.44.

Au retour de l'accidenté au régiment, il fut constaté que la fracture n'était pas consolidée. L'appelante fit hospitaliser Bérubé pendant 67 jours au total dans divers hôpitaux militaires et lui accorda trois congés d'invalidité de trente jours chacun.

L'accidenté, le 2 septembre 1954, à son retour au régiment, n'avait pas informé la Commission des Accidents du Travail de Québec et le service des réclamations dut entreprendre les recherches pour le retracer.

Le 10 novembre 1954, le Lieutenant-Colonel Trudeau, commandant du Royal 22e Régiment à Valcartier fut avisé par lettre et requis de répondre si l'autorité militaire devait, dorénavant, assumer les frais de l'accidenté.

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Le 19 novembre 1954, le Colonel Trudeau répondait à la Commission, disant qu'elle serait avisée lorsque les dispositions seraient prises, dès que les résultats de la Commission d'enquête seraient connus.

Malgré cette lettre, aucune communication ou réclamation ne fut dirigée ni à la Commission des Accidents du Travail de Québec, ni à l'intimée par Bérubé ou par les autorités militaires.

La réclamation de la Couronne était au total de $2,689.95 y compris (1) $924.55 valeur de soins médicaux et (2) $1,765.40 de solde et des allocations. L'appelante soumet que l'accident a été causé par la faute de l'intimée, qu'en l'occurrence sa propre loi l'obligeait à verser ces prestations, que celles-ci sont la mesure du préjudice qu'elle a subi, et qu'elle a droit de les réclamer de l'intimée.

Bérubé a été assigné à un travail des plus simple, pour une manœuvre, un ouvrage qui, de sa nature, ne comporte aucun danger: la preuve révèle qu'il avait déjà accompli le même genre d'ouvrage dans des conditions identiques.

Il admit que les instructions venant de la direction lui ont été transmises à plusieurs reprises par le contremaître Lemieux, qu'il reconnaît comme un homme compétent et consciencieux. Le jour même de l'accident, le contremaître avait averti de ne pas creuser plus que nécessaire pour la pose d'une section de tuyautage d'un pied. Au moment de l'accident le contremaître était tout près de la victime.

Les instructions générales, par le Président de l'intimée, étaient les suivantes:—«Passé quatre pieds, si vous voyez que ça devient dangereux, boisez», et comme question de fait, les pièces de bois avaient été amenées et déposées sur le bord de la tranchée pour parer à toute éventualité. L'éboulis s'est produit alors que tout paraissait normal.

Les travaux étaient surveillés de près par un contremaître consciencieux et expérimenté qui se tenait sur les lieux. Les ouvriers étaient entraînés au travail qu'ils accomplissaient; les précautions nécessaires avaient été prises; les ouvriers n'avaient pas prévenu le contremaître d'aucun danger apparent.

La Cour de l'Échiquier[1] renvoya l'information, par le motif principal que la Couronne n'a pas réussi à établir comme question de fait que l'intimée a commis aucune

[1] [1960] Ex. C.R. 261.

faute qui aurait engendré sa responsabilité suivant les dispositions du *Code Civil* de Québec. Il y a preuve suffisante pour soutenir ce jugement; je partage l'appréciation de la preuve du savant juge au procès, et ne saurait la modifier.

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THE QUEEN v. POUDRIER & BOULET LTÉE.

Abbott J.

Dans les circonstances ci-dessus relatées, je ne trouve pas qu'il convienne de considérer la question, à savoir si la Couronne pourrait soutenir avec succès une réclamation contre l'intimée dans le cas où il y aurait eu faute de la part de cette dernière.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: E. A. Driedger, Ottawa.

Solicitor for the defendant, respondent: A. Laplante, Quebec.

E. H. M. FOOT (*Defendant*) .....APPELLANT;

1962

*Dec. 13, 14

AND

1963

LEON H. RAWLINGS (*Plaintiff*) .....RESPONDENT.

Mar. 7

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Agreement to forbear from taking action on promissory notes—Undertaking by debtor to perform certain obligations—Good consideration—Creditor's right to sue suspended—Action on notes premature.

An action was brought for the balance owing on six promissory notes, all of which were made by the defendant payable to the plaintiff. Before the commencement of the action the parties had executed an agreement as to five of the notes, whereby it was agreed that the defendant would pay, and the plaintiff would accept, $300 per month at 5 per cent, instead of $400 at 8 per cent, until the account was fully paid. It was orally agreed that payment of the sixth note should be postponed until the first five had been paid pursuant to the terms of the written agreement. The payments, starting on August 16, 1958, were to be paid on or before the 16th of each month. From time to time the defendant was to give the plaintiff a series of six post-dated cheques, each series to cover a period of six months. The several series were so given, but the cheques for the period July to December, 1960, were in each case dated on the 18th instead of the 16th, apparently as the result of inadvertence. These cheques

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were accepted by the plaintiff as being in compliance with the agreement; those for July to November were cashed as they came due.

The writ was issued on December 7, 1960. The defendant argued that the action was premature by reason of the written and oral agreements. However, the trial judge found that there had been default on the part of the defendant in respect of the cheques payable in October and November, 1960, and directed that the plaintiff recover the full amount of principal and interest outstanding on the notes. An appeal from this judgment was dismissed by the Court of Appeal, one member dissenting. The defendant appealed to this Court.

Held: The appeal should be allowed.

At the date of the issue of the writ the agreement between the parties was in existence and the defendant was not in default under its terms.

The giving of the several series of post-dated cheques constituted good consideration for the agreement by the plaintiff to forbear from taking action on the promissory notes so long as the defendant continued to deliver the cheques and the same were paid by the bank on presentation. *Sibree v. Tripp* (1846), 15 M. & W. 23, applied; *Foakes v. Beer* (1884), 9 App. Cas. 605, referred to. The inclusion in the agreement of a privilege of prepayment did not affect the question. The defendant did not reserve any option to himself to refrain from delivering the cheques or from providing for their payment by the bank.

As held by the Court below, the plaintiff's right of action on the six promissory notes had not been extinguished. It followed that should the defendant have made default under the agreement, it would thereupon have been open to the plaintiff to bring action for the amount remaining unpaid on the notes; but an agreement for good consideration suspending a right of action so long as the debtor continues to perform the obligations which he has undertaken thereunder is binding. To hold that the claimant in such a case may, in breach of the agreement, pursue his right of action leaving the defendant to a cross-action or counterclaim would be to countenance the circuity of action and multiplicity of proceedings which it was one of the chief objects of the Judicature Acts to abolish and would be contrary to the terms of subs. 7 of s. 2 of the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213. *British Russian Gazette & Trade Outlook Ltd. v. Associated Newspapers Ltd.* [1933] 2 K.B. 616, distinguished; *Stracy v. The Governor and Company of the Bank of England* (1830), 6 Bing. 754, applied.

So long as the defendant in the instant case continued to perform his obligations under the agreement, the plaintiff's right to sue on the notes was suspended; consequently, the action brought on December 7, 1960, was premature and accordingly should have been dismissed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Maclean J. Appeal allowed.

Joseph McKenna, Q.C., for the defendant, appellant.

[1] (1962), 37 W.W.R. 289, 32 D.L.R. (2d) 320.

Robert A. Price, for the plaintiff, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Maclean J. directing that the respondent recover the full amount of principal and interest outstanding on six promissory notes and that there be a reference to ascertain the total outstanding. Davey J.A., dissenting, would have allowed the appeal and dismissed the action.

The particulars of the notes sued on, all of which were made by the appellant payable to the respondent, are as follows:

1. Promissory Note dated February 4, 1952, to secure the sum of $4,000 with interest thereon at the rate of 8% per annum, payable on demand.

2. Promissory Note dated February 4, 1952, to secure the sum of $5,000 with interest thereon at the rate of 8% per annum, payable on demand.

3. Promissory Note dated February 4, 1952, to secure the sum of $5,000 with interest thereon at the rate of 8% per annum, payable on demand.

4. Promissory Note dated February 4, 1952, to secure the sum of $2,000 with interest thereon at the rate of 8% per annum, payable on demand.

5. Promissory Note dated October 10, 1956, to secure the sum of $5,000 payable to the plaintiff on May 1, 1957.

6. Promissory Note dated May 5, 1958, to secure the sum of $4,576.01, with interest thereon at the rate of 6% per annum, payable to the Plaintiff on December 10, 1958.

All the notes were dated at Victoria, B.C.; the first five were payable "at Victoria B.C."; the sixth was payable "at the Canadian Bank of Commerce here".

No question is raised as to the making or the validity of the notes or as to the finding of the learned trial judge that the sixth note was duly presented for payment. The defence is that the action was premature by reason of a written agreement between the parties as to the first five notes and an oral agreement as to the sixth note.

[1] (1962), 37 W.W.R. 289, 32 D.L.R. (2d) 320.

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The written agreement was in the form of a letter addressed by the respondent to the appellant. It reads as follows:

July 7th, 1958.

E. H. M. Foot, Esq.,
Bank of Toronto Building,
Douglas St., Victoria, B.C.

Dear Sir:—

I have been thinking matters over regarding your indebtedness to me and after a good deal of thought I think that you may be interested in the following proposal:

(1) That I accept the sum of $300.00 per month provided that it is paid on the sixteenth of each and every month without fail, and I agree to lower the interest from eight per cent to five per cent.

(2) The above offer only to take place provided you do not miss any of the Three hundred dollar payments, which are to be paid monthly, starting on August 16th, 1958 and to be paid to me on or before the sixteenth of each and every month following until the full account is paid.

(3) These cheques to be for $300.00 each and the first to be payable on the 16th day of August 1958, and every month following, these cheques to be given to cover the following six months starting on the 16th of Angust 1958 and to the 16th of February 1959, after which you are to give me six more such cheques to carry on the next six months, that would take it to August 1959 after which you are to give me six more such cheques to cover another six months and so on until the account is fully paid.

(4) Should any of these cheques be turned down by the C.B. of C. the whole of the unpaid indebtedness will go back to the present state namely, the interest will revert to the present eight per cent, and the monthly payments revert to $400.00 per month.

(5) My reason for making this offer is not only to help you in your finances but to help me carry on. I realize that I am not going to have many more years to live and would like to be able to do several things before that time comes. This is clearly an advantage to you, as first of all you save three per cent in interest which at the present rate you are paying saves you Fifty dollars per month.

(6) You of course to have the privilege of paying off the whole debt to me at any time you may wish to do so, this offer must be accepted in writing on or before August next.

(7) I, E. H. M. Foot, agree to the above terms of payment.

This was signed by both parties on July 17, 1958.

It was orally agreed between the parties that payment of the sixth note should be postponed until the first five had been paid pursuant to the terms of the written agreement.

The respondent sent to the appellant from time to time the several series of six post-dated cheques called for by paragraph 3 of the agreement; but the six cheques dated in the months of July 1960, to December 1960, inclusive, were in each case dated on the 18th instead of the 16th of the month. These were sent in a letter from the appellant to the respondent dated July 26, 1960, which stated that they were sent "in accordance with our continuing agreement of the past several years relating to the balance of the monies I owe you". It would seem that dating these cheques on the 18th was the result of inadvertence.

It may be that the respondent could have elected to regard the lateness in sending the July cheque and the dating of all six on the 18th instead of the 16th as a default entitling him to rescind the agreement but he did not do so. He acknowledged them by letter to the appellant dated July 28th, 1960, in which he said:

> I wish to acknowledge receipt of six $300.00 cheques, dating from July 18th to Dec. 18th '60 as per your letter to me of July 26th, these cheques to be cashed as dated.

This was followed by a statement of the balance of the account to date.

The cheques dated in July 1960, to November 1960, were all cashed by the respondent. The writ was issued on December 7, 1960.

On the question whether at the date of the issue of the writ the appellant was in default under the agreement I wish to adopt the following passage in the reasons of Davey J.A.:

> In accordance with the memorandum the appellant delivered to the respondent each series of six post dated cheques. But, with the series of cheques payable from July 16th, 1960, to December, 1960, the appellant through some oversight post dated each one, including those for October, November and December, 1960, on the 18th instead of the 16th of each month. It is clear that the respondent accepted that as a compliance with the memorandum, cashed the cheques as they came due, and credited the appellant with the proceeds. From page 112 of the appeal book it would appear that the default respondent relied on in the trial Court lay in the circumstance that the cheques for these three months were dated the 18th instead of the 16th. That seems to have been the default found by the learned trial Judge. But, with deference, I am unable to regard that as a default in face of the respondent's conduct. Before us, respondent's counsel finally conceded that he didn't seriously rely on that as a default.
>
> When I first read the appeal book, it occurred to me that the learned trial Judge might have concluded from the dates in respondent's accounts that the appellant's cheques for October and November, 1960,

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had not been paid until the last days of those months. But that was not argued before us, and, apparently, not below. In any event it was not raised in the evidence of either appellant or respondent. The dates entered in respondent's accounts may just as well have been due to the respondent's delay in presenting the cheques for payment or to his method of keeping his accounts. The latter explanation seems to be the more likely, since in respondent's statement for November, 1960, enclosed in an envelope post-marked November 22, 1960, he gives appellant credit for the November payment under date of November 30, 1960. Also in Exhibit 10, the respondent has credited each of the monthly payments for June to November, 1960, as of the last day of each month.

In my respectful opinion, there was no default in the payments for October or November, 1960.

It should be mentioned that before us counsel for the respondent stated that he does rely on the fact that these cheques were dated on the 18th instead of on the 16th as constituting default. In reaching my agreement with the view of Davey J.A. that there was no default I do not base my conclusion on any concession that may have been made by counsel at any stage of the proceedings.

I take it then that the factual situation at the date of the issue of the writ was that the agreement between the parties was in existence and the appellant was not in default under its terms. The question calling for decision is whether this rendered the action premature.

The learned trial judge found that there had been default by the appellant in respect of the cheques payable in October and November, 1960, and consequently did not find it necessary to deal with the other points which were fully argued before us; it is clear, however, that the point which appears to me to be decisive of the appeal was taken before him. He says:

In his reply the plaintiff pleaded lack of consideration for the agreement, and in this connection a point of some nicety arose as the defendant contended that the giving of the post-dated cheques constituted consideration sufficient to support the agreement.

I have reached the conclusion that the giving of the several series of post-dated cheques constituted good consideration for the agreement by the respondent to forbear from taking action on the promissory notes so long as the appellant continued to deliver the cheques and the same were paid by the bank on presentation. This view of the law has prevailed ever since the Court of Exchequer in

Sibree v. Tripp[1] expressed disapproval of the decision in *Cumber v. Wane*[2]. In *Sibree v. Tripp* the defendant pleaded in answer to a claim for five hundred pounds that the plaintiff had agreed to accept as full payment three promissory notes made by the defendant payable to the plaintiff for one hundred and twenty-five pounds, one hundred and twenty-five pounds and fifty pounds and that the defendant had given these notes to the plaintiff in pursuance of the agreement. It was held that this plea was a good answer to the action in point of law as the acceptance of a negotiable instrument may be in law a satisfaction of a debt of a greater amount. At pp. 37 and 38 Baron Alderson said:

> It is undoubtedly true, that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is *payment* only in part; it is not one bargain, but two, namely, payment of part, and an agreement, without consideration, to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute for a sum of money a piece of paper, or a stick of sealing-wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of One Hundred pounds, a horse of the value of five pounds, but not five pounds. Again, if the time or place of payment be different, the one sum may be a satisfaction of the other. Let us, then, apply these principles to the present case. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value. That is a case falling within the rule of law I have referred to.

There is nothing in the judgments delivered in the House of Lords in *Foakes v. Beer*[3] to throw any doubt on the rule laid down in *Sibree v. Tripp;* indeed its validity is assumed and the case is distinguished. For example, at p. 613 the Earl of Selborne L.C., says:

> All the authorities subsequent to *Cumber v. Wane,* which were relied upon by the appellant at your Lordships' Bar (such as *Sibree v. Tripp. Curlewis v. Clark* and *Goddard v. O'Brien*) have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships.

[1] (1846), 15 M. & W. 23, 15 L.J. Ex. 318.
[2] (1721), 1 Stra. 426, 11 Mod. Rep. 342.
[3] (1884), 9 App. Cas. 605.

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Sheppard J.A., with whom Tysoe J.A. agreed, was of opinion that there was no consideration for the agreement; he expressed doubts as to whether on the true construction of the agreement the appellant had promised to deliver the cheques and cause them to be paid and continued:

> In any event, assuming that the promise had been given by the defendant as alleged, that performance may be effected by the defendant paying the debt in full (Clause 6), but there can be no legal prejudice in such payment as the debt has throughout remained due and owing. Hence the promise of the defendant to deliver the cheques could be avoided without legal prejudice, namely, by paying the debt in full, and therefore the promise is not a valid consideration.
>
> Williston on Contracts, revised edition, p. 365, reads:
>
> 'That a promise which in terms reserves the option of performance to the promisor is insufficient to support a counter-promise is well settled.'

On the question of construction I agree with Davey J.A. when he says:

> As a matter of construction, the agreement clearly implies that so long as there is no default in its terms the respondent will not sue on the notes, but will forbear from bringing action. A promise to forbear is readily implied from an arrangement such as this.

In my view, when paragraphs 3 and 7 of the agreement are read together they disclose an undertaking by the appellant to give the cheques from time to time in accordance with paragraph 3; this undertaking is the consideration for the respondent's agreement to withhold action and so long as the appellant continued to carry it out the respondent's right to sue was suspended.

With the greatest respect I am unable to agree that the inclusion in the agreement of a privilege of prepayment affects the question. The authorities to which Sheppard J.A. refers are distinguishable on their facts. In the case at bar the appellant did not reserve any option to himself to refrain from delivering the cheques or from providing for their payment by the bank.

There was a further ground upon which Sheppard J.A. would have dismissed the appeal, which is expressed as follows:

> Further, the written agreement, if a valid contract, does not create a defence. The promise by the plaintiff is merely to withhold action; there was no intention to extinguish the debt. Hence, assuming a valid contract and a binding promise to withhold action, that was a mere accord and until such time as there is satisfaction, such an accord does not divest the plaintiff of his right of action.

The learned Justice of Appeal refers to the reasons of Greer L.J. in *British Russian Gazette & Trade Outlook Ltd. v. Associated Newspapers Ltd.*[1], and to *Chitty on Contracts*, 20th ed., at p. 286, and continues:

> It follows that notwithstanding such 'contract', the plaintiff could bring action on the five promissory notes then due although he might make himself liable to damages for not withholding action as agreed. The oral agreement relating to the sixth note affords no defence for the same reasons.

I agree with the view of Sheppard J.A. that the respondent's right of action on the six promissory notes has not been extinguished. It follows that should the appellant have made default under the agreement of July 17, 1958, it would thereupon have been open to the respondent to bring action for the amount remaining unpaid on the notes; but an agreement for good consideration suspending a right of action so long as the debtor continues to perform the obligations which he has undertaken thereunder is binding. To hold that the claimant in such a case may, in breach of the agreement, pursue his right of action leaving the defendant to a cross-action or counter claim would be to countenance the circuity of action and multiplicity of proceedings which it was one of the chief objects of the Judicature Acts to abolish and would be contrary to the terms of subs. 7 of s. 2 of the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213.

The judgments in the *British Russian Gazette* case were not directed to the question whether an agreement for good consideration suspending or postponing a right of action can be pleaded as a bar to an action brought prematurely.

On this point I think it sufficient to refer to one authority. In *Stracy v. The Governor and Company of the Bank of England*[2], the plaintiffs had a valid claim against the bank for having transferred stock standing in their names to another name under a forged power of attorney. The plaintiffs, for good consideration, agreed not to take action until they had made a claim under a commission of bankruptcy isued against the firm in which the forger of the power had been a partner. It was held that until they had fulfilled their engagement to tender a proof under the commission of bankruptcy they could not sue the bank. Tindal C.J.

[1] [1933] 2 K.B. 616 at 655.
[2] (1830), 6 Bing. 754, 8 L.J. O.S.C.P. 234.

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delivering the unanimous judgment of the Court of Common Pleas (other than Bosanquet J., who had been engaged in the cause and took no part in the judgment,) said:

at p. 773:

> We all think our judgment ought to be given for the Defendants, upon another point which has been presented for the consideration of the Court. For it appears to us that the Plaintiffs have, before the commencement of this action, entered into an agreement with the Defendants upon good consideration; under which agreement their right of action is suspended, until they take the proceeding which they had bound themselves by such agreement to adopt.

at p. 774:

> It is urged by the Plaintiffs, that if this is an agreement on their part, it may be the ground of an action by the Bank to recover damages, but that it is no bar to the present action. But the agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time. It is urged as an agreement by which the Plaintiffs have for a good consideration restrained themselves from suing, not perpetually, but only until they have first done a particular action.

and at p. 775:

> Under these circumstances, we think the Defendants, in order to avoid circuity of action, may avail themselves of this agreement as a suspension of the Plaintiffs' right to sue in the present action, and that they are not confined to a remedy by a cross action thereon.

Judgment was accordingly given for the defendants.

In my opinion the reasoning of this judgment is applicable to the facts of the case at bar. So long as the appellant continued to perform his obligations under the agreement of July 17, 1958, the respondent's right to sue on the notes was suspended, consequently his action brought on December 7, 1960, was premature and should have been dismissed on that ground.

The reasons which have brought me to the conclusion that the action was premature make it unnecessary to consider either the ground of estoppel on which Davey J.A. proceeded or the arguments addressed to us as to the effect of subs. 33 of s. 2 of the *Laws Declaratory Act*.

I would allow the appeal, set aside the judgment of the Court of Appeal and that of the learned trial judge and direct that judgment be entered dismissing the action with costs throughout.

Appeal allowed.

Solicitor for the defendant, appellant: Joseph McKenna, Victoria.

Solicitor for the plaintiff, respondent: Robert A. Price, Victoria.

THE LONDON LIFE INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

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*Feb.19, 20
Mar. 7

AND

MARY CATHERINE CHASE (*Plaintiff*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Insurance, Life—Death of insured result of gunshot wound—Claim by beneficiary—Defence of suicide raised—Proof of suicide not established —Whether proper standard of proof adopted.

The plaintiff's husband, on whose life an insurance policy had been issued by the defendant company, died as the result of a gunshot wound while the said policy was in force. The deceased was found lying prone with a bullet wound in his right temple and a rifle was lying on or beside the body. An action having been brought on the policy, the company invoked a provision thereof which read: "In case the life insured shall die by his own hand whether sane or insane within two years from the date on which this policy is issued, the liability of the company hereunder shall be limited to an amount equal to the premiums paid on this policy without interest." The trial judge held that the defendant had not satisfied the onus resting upon it to show that the deceased had committed suicide. However unlikely an accident might be as an explanation of the death, it was not beyond all possibility, and it was not more unlikely than that a normal, cheerful, happy young man had deliberately taken his life. The Court of Appeal, by a majority, affirmed the judgment at trial; the defendant then appealed to this Court.

Held: The appeal should be dismissed.

The Courts below did not adopt any standard of proof other than that of weighing the probabilities and improbabilities of the plaintiff's case against those of the case for the defendant, and having due regard to the seriousness of the allegation of suicide and the complete absence of motive they concluded that the preponderance of evidence weighed in the plaintiff's favour. This was no departure from the

*PRESENT: Cartwright, Abbott, Martland, Ritchie and Hall JJ.

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rule with respect to the burden resting upon those who set out to prove the commission of a criminal or quasi-criminal offence in civil cases as it has been accepted in this Court. *Clark v. The King* (1921), 61 S.C.R. 608; *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312; *New York Life Insurance Co. v. Schlitt*, [1945] S.C.R. 289; *Industrial Acceptance Corporation v. Couture*, [1954] S.C.R. 34; *Hanes v. Wawanesa Mutual Insurance Co.* [1963] S.C.R. 154, referred to.

Tritschler J.A., one of the dissenting Justices of Appeal, discounted entirely the complete absence of motive. It has been clearly recognized that motive taken alone is of very little probative value in counterbalancing the presumption against suicide, but it did not follow from this that complete absence of evidence of motive when taken in conjunction with the unnatural quality of the act of self-destruction can never be a decisive factor in support of the theory that death was accidental. *New York Life Insurance Co. v. Schlitt, supra; Dominion Trust Co. v. New York Life Insurance* Co. [1919] A.C. 254, referred to.

There was no error in the standard of proof adopted in this case, and as there was evidence to support the finding of accidental death the appeal was accordingly dismissed.

APPEAL from a judgment of the Court of Appeal for Manitoba, dismissing an appeal from a judgment of Bastin J. Appeal dismissed.

J. J. Robinette, Q.C., and *J. Flynn*, for the defendant, appellant.

D. E. Bowman and *J. S. Walker*, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Manitoba affirming the judgment of Bastin J. which ordered that the respondent recover against the London Life Insurance Company the proceeds of an insurance policy issued by that company on the life of her husband Robert L. Chase with effect from the 15th of April 1959.

Robert L. Chase died as the result of a gunshot wound on May 1, 1959, and the appellant, while admitting that the policy in question was then in force, invokes the following provision thereof:

> In case the life insured shall die by his own hand whether sane or insane within two years from the date on which this policy is issued, the liability of the company hereunder shall be limited to an amount equal to the premiums paid on this policy without interest.

The learned trial judge has summarized the evidence concerning the character and background of the late Robert Chase and the circumstances of his death in the following paragraph of his reasons:

> The late Robert Leroy Chase and the plaintiff were 23 years of age at the date of his death. They had been married for four years and were living with their children, aged respectively 2½ years and 5 months, in a house they were purchasing in the Town of Transcona. Mr. Chase had been employed by the Canadian National Railways for 7 years as a clerk and was receiving a monthly wage of $365.00. On the evening of May 1st, 1959, he had gone to a "stag" party, for a friend who was getting married, at the Canadian Legion Hall. He returned at about 20 minutes to midnight, kissed his wife who was dozing on the chesterfield, and went to the bathroom at the rear of the house. He then went into a room, across the hall from the bathroom, which was used for storage purposes. On hearing a sound his wife went to this room and found him lying on the floor. She summoned her family, consisting of her father, mother and brother, from their home 2½ blocks away and her father summoned the police. Within a few minutes Sergeant Teres, who is now Chief Constable of the Transcona Police, arrived with two constables and found the deceased lying prone with a bullet wound in his right temple.

All the judges in the Courts below concluded that the fatal wound indicated that the muzzle of the rifle was in close contact with the skin at the moment when the bullet and propelling gases left the barrel and entered the skull of the deceased, and Dr. Fontaine, a highly qualified expert called on behalf of the appellant, testified that the nature of the wound, the position of the body, and the character of the rifle all pointed to suicide as the only logical explanation of the death.

The learned trial judge noted that Dr. Fontaine's reconstruction of the shooting was based entirely on the evidence of other witnesses and that while it appeared to account for all the known facts and to justify the opinion that the death was suicidal, it nevertheless did not exclude the possibility of accident.

In the course of his reasons for judgment, Mr. Justice Bastin stated his view of the issue before him in the following terms:

> The issue before me is whether the circumstances of the death of Robert Leroy Chase are not only consistent with suicide but inconsistent with any other reasonable explanation. The issue might be put in another way by asking the question: Has the fact of suicide been proved to my reasonable satisfaction, in spite of the inherent unlikelihood of this conclusion as shown by the evidence as to character and situa-

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tion of the deceased? However the issue is expressed, I conclude that the degree of improbability of suicide in the circumstances must be overborne by the cogency of the proof.

After a careful review of the evidence, the learned trial judge concluded by saying:

> I have come to the conclusion that however unlikely accident may be as an explanation of the death it is not beyond all possibility and it is not more unlikely than that this normal, cheerful, happy young man deliberately took his life. The defendants have therefore not satisfied the onus resting upon them.

In the Court of Appeal, the opinion of the majority was delivered by Schultz J. who, having cited the well-known decision of Mignault J. in *London Life Insurance Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*[1] went on to say:

> By virtue of that case the burden resting on the defendants in the instant case was that they must prove affirmatively not only that the evidence is consistent with this allegation of suicide but further that it is inconsistent with any rational explanation.

These and other excerpts from the judgments in the Courts below were cited by the appellant's counsel as evidence of the fact that the trial judge and the majority of the judges in the Court of Appeal had misdirected themselves as to the standard of proof applicable to the circumstances, and it was pointed out that some of the language used was capable of being construed as meaning that in assessing the evidence these judges were guided by the rule applicable to criminal cases or that they applied an even higher standard of proof but when the judgments are read as a whole I do not think that they bear out this construction.

It is apparent from the judgment of Schultz J.A. that he discounted the evidence of Dr. Fontaine, which was the cornerstone of the appellant's case, and that he was strongly influenced by the complete lack of proof of any kind of motive for suicide. In my view, the true basis of his decision is to be found in the following paragraph:

> These considerations lead me to conclude that having regard to the physical facts relevant to the death of Robert Chase, the story advanced by the plaintiff though open to question on some points is a possible and rational one. But when in addition to such considerations, regard is had to the fact that there was a complete absence of any motive for death on the part of the insured, and every reason and desire to live, I am persuaded that the theory of the plaintiff, bearing in mind the

[1] [1929] S.C.R. 117, 1 D.L.R. 328.

totality of all the circumstances, is a more consistent and rational one than the hypothesis advanced by the defendants which wholly ignores the evidence of lack of motive.

After considering the decisions of Bastin J. and Schultz J.A. in their entirety, I cannot say that they adopted any standard other than that of weighing the probabilities and improbabilities of the plaintiff's case against those of the case for the defendant and that having due regard to the seriousness of the allegation of suicide and the complete absence of motive they concluded that the preponderance of evidence weighed in the plaintiff's favour. I do not regard this as any departure from the rule with respect to the burden resting upon those who set out to prove the commission of a criminal or quasi-criminal offence in civil cases as it has been accepted in this Court. (See *Clark v. The King*[1]; *Smith v. Smith and Smedman*[2]; *New York Life Insurance Company v. Schlitt*[3]; *Industrial Acceptance Corporation v. Couture*[4]; and *Hanes v. Wawanesa Mutual Insurance Company*[5].)

It is interesting to note that the same rule was applied by the Court of Appeal of Manitoba in the case of *Derrington v. Dominion Insurance Corporation*[6], a decision which was rendered very shortly after the present case was decided in that Court and to which Schultz J.A. was a party.

It would not be proper to ignore the thorough and analytical dissenting judgments of Tritschler J.A. and Guy J.A., the former of which was particularly relied on by the appellant. An examination of the opinion of Tritschler J.A. discloses that the learned judge discounted entirely the complete absence of motive and he said in the last paragraph of his reasons:

> The absence of evidence of motive can never be decisive. The proof of suicide is to be sought in the circumstances of the death. These circumstances force me to the conclusion that the death was self-inflicted with intent.

In the present case, it appears to me that there was not only "absence of evidence of motive" but "evidence of absence of motive" and it was interesting to note that

[1] (1921), 61 S.C.R. 608 at 616-17, 59 D.L.R. 121.
[2] [1952] 2 S.C.R. 312 at 331, 3 D.L.R. 449.
[3] [1945] S.C.R. 289, 2 D.L.R. 209.
[4] [1954] S.C.R. 34.
[5] [1963] S.C.R. 154.
[6] (1962), 39 W.W.R. 257, 35 D.L.R. (2d) 220

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counsel were unable to point to any decided case in which suicide was raised as a defence and where, as here, there was no evidence to support either motive or insanity as a contributing cause.

The weight to be attached to evidence of motive in a suicide case was discussed by Taschereau J. in *New York Life Insurance Co. v. Schlitt, supra,* where he said, at p. 301:

> Motives are indeed very unreliable and they cannot be classified as an accurate determining cause of human deeds which they too often influence in different ways. Taken alone, and not coupled with other extraneous evidence, they have very little probative value, and surely those that are alleged in the case at bar do not rebut the presumption against suicide.

It has thus been clearly recognized that motive taken alone is of very little probative value in counter-balancing the presumption against suicide but it does not, in my opinion, follow from this that complete absence of evidence of motive when taken in conjunction with the unnatural quality of the act of self-destruction can never be a decisive factor in support of the theory that death was accidental.

The case of *Dominion Trust Co. v. New York Life Insurance Co.*[1] was one in which suicide was raised as a defence by the life insurance company and Lord Dunedin had occasion to observe that:

> The evidence to be examined in such a case falls at once into two distinct divisions. There is the evidence which bears on the motive for such an act, and there is the evidence of the facts as to the method of death, which include *all* actions of the deceased antecedant to, and possibly leading up to, the castastrophe.

In my opinion, the majority of the judges in the Courts below concluded that although the method of Chase's death made it improbable that he shot himself accidentally, the story of his life made it even more improbable that he committed suicide.

I do not find that there was any error in the standard of proof adopted in this case, and as I am of opinion that there was evidence to support the finding of accidental death I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Fillmore, Riley & Company, Winnipeg.

Solicitors for the plaintiff, respondent: Walsh, Micay & Company, Winnipeg.

[1] [1919] A.C. 254.

THE CITY OF SAINT JOHN (*Plaintiff*) ..APPELLANT; 1963

*Feb. 25, 26
Mar. 13

AND

IRVING PULP & PAPER LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Contracts—Agreement to supply water to pulp mill—Validity of agreement—Whether beyond powers of City to make—An Act to Consolidate the Laws Relating to Sewerage and Water Supply, in the City of Saint John, and in Portions of the Parishes of Lancaster and Simonds, 1914 (N.B.), c. 83—Saint John City Assessment Act, 1948, 1948 (N.B.), c. 137.

Under an agreement dated October 16, 1958, the appellant agreed to supply the respondent's mills with an estimated quantity of thirty million gallons of water per day, for which the respondent agreed to pay a fixed amount of $35,000 per year, for a period of twenty-five years, and further agreed to pay a consumption charge of one cent per thousand gallons for the first nine million gallons and one-half cent per thousand gallons for consumption in excess of nine million gallons. Some time subsequent to the making of this agreement the appellant took the position that it was void and of no effect, as being beyond the powers of the appellant to make. On December 21, 1959, the Water Assessment Department of the appellant wrote to the respondent advising that as no agreement had been negotiated with that department, by the legislative authority vested in the department, under the direction of the department's head, the rate to be charged would be five cents per thousand gallons. Later, the appellant sued the respondent for moneys alleged to be due for water supplied. Judgment was given by the trial judge in favour of the respondent and this decision having been affirmed by the Appeal Division of the Supreme Court of New Brunswick, the appellant appealed to this Court.

Held: The appeal should be dismissed.

Section 70 of the *Saint John City Assessment Act, 1948*, 1948 (N.B.), c. 137, did not confer upon the Assessment Department the power to make the kind of agreement in question and it did not prevent the appellant, by its Common Council, from determining rates in relation to those special cases which were provided for in s. 5 of *An Act to Consolidate the Laws Relating to Sewerage and Water Supply, in the City of Saint John, and in Portions of the Parishes of Lancaster and Simonds*, 1914 (N.B.), c. 83.

Section 70 of the 1948 Act appeared in the same terms as s. 55 of the *Saint John City Assessment Act, 1942*, 1942 (N.B.), c. 80. Read against the background of earlier legislation, s. 55 was never intended to do anything more than to transfer to the Assessment Department those powers which, prior thereto, had been exercised by the Director of the Department of Water and Sewerage and which, before 1936, had been exercised by the Commissioner of Water and Sewerage,

*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

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together with the power of assessment and rate determination which, under s. 30 of the 1914 Act had been vested in the Common Council of the appellant, with, in some instances, the Councillors of the Parishes of Lancaster and Simonds.

It was significant that the power conferred upon the Assessment Department appeared in the *Assessment Act* and not in a statute amending the 1914 Act. The *Assessment Act* dealt specifically with the making of assessments and the imposition of rates. It was inconceivable that the Legislature, without any reference whatever to the wide powers of the Common Council conferred by s. 5 of the 1914 Act, and with no repeal thereof, could be deemed to have repealed s. 5 by implication and to have given those broad discretionary powers conferred upon the Common Council to a city department, under the direction of a departmental head who was, himself, appointed by and responsible to the Common Council.

Attention was also to be paid to the saving provision which appears at the end of s. 70 of the 1948 Act: "but all provisions of said Act and Acts mentioned and all amendments thereto, not inconsistent with this Act are to be construed as still in force and effect." The only provisions of the 1914 Act which could be preserved by this saving clause were those contained in s. 5.

The resolution of the Common Council, passed on October 17, 1957, agreeing in principle to the agreement between the appellant and the respondent, coupled with the resolution authorizing the execution of the agreement passed on October 8, 1958, with which resolution that agreement must be read, constituted a resolution of the kind provided for in s. 5. Thereafter the appellant was not entitled to increase the rates, during the twenty-five year period, above those provided by the resolution.

The joint meetings of the Common Council of Saint John and Councillors of Lancaster and Simonds provided for in s. 29 of the 1914 Act related only to those matters provision for which was made in s. 30; *i.e.*, the assessment and imposition of water rates. Section 5 stood by itself and dealt with a special situation. By its terms it referred only to a resolution of the Common Council of the City of Saint John and that Common Council alone had the power to pass a resolution for the purposes of that section. It could do so without the presence of any Councillors from the other municipalities whose territory was within the Water District.

APPEAL from a judgment of the Appeal Division of the Supreme Court of New Brunswick, affirming a judgment of Michaud C.J.Q.B.D. Appeal dismissed.

J. P. Barry, Q.C., and *G. T. Clark, Q.C.*, for the plaintiff, appellant.

A. B. Gilbert, Q.C., *D. M. Gillis, Q.C.*, and *W. E. Clarke, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:— This is an appeal from the unanimous judgment of the Appeal Division of the Supreme Court of New Brunswick, which had affirmed the decision of Chief

Justice Michaud, which gave judgment in favour of the respondent, with costs. The appellant sued the respondent for moneys alleged to be due for water supplied by the appellant to the respondent. The water, which had been supplied to the respondent from the appellant's Loch Lomond system, was billed on the basis of five cents per thousand gallons.

In answer to the appellant's claim, the respondent relied upon an agreement between the parties dated October 16, 1958. The background of this agreement is set forth in its recitals as follows:

> WHEREAS the Company operates a pulp mill in the City of Lancaster in the Saint John Water District and has been using water supplied by the City from its Spruce Lake watershed;
>
> AND WHEREAS the said supply of water is inadequate for the purposes of the Company and the Company is also desirous of expanding its operations by the construction of an additional pulp mill, or kraft pulp mill;
>
> AND WHEREAS the City has agreed to construct a pipeline to conduct water from its mains in the City across the Reversing Falls Bridge to the Company's property in the City of Lancaster to supply additional water to the said mill and to enlarge its pipeline and storage facilities from and at Loch Lomond and other lakes in the Water District.

This agreement went on to provide for the construction by the appellant of certain pipelines and the enlargement by it of its water storage facilities at Loch Lomond, so as to supply the respondent's mills with an estimated quantity of thirty million gallons of water per day.

The respondent agreed to pay to the appellant a fixed amount of $35,000 per year, for a period of twenty-five years, and further agreed to pay a consumption charge for such water at the rate of one cent per thousand gallons for the first nine million gallons and one-half cent per thousand gallons for consumption in excess of nine million gallons.

Some time subsequent to the making of this agreement the appellant took the position that it was void and of no effect, as being beyond the powers of the appellant to make, and on December 21, 1959, the Water Assessment Department of the appellant wrote to the respondent, advising that:

> As no agreement has as yet been negotiated with this department with respect to the charge to you for supply of water from this source (the Loch Lomond system), by the legislative authority vested in this department, under my direction, the rate to be charged shall be five cents per thousand gallons.

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The main question in issue in these proceedings is as to the validity of the agreement, as the appellant concedes that if it is valid the appeal must fail.

The appellant's main argument is that it had no legal authority to make the agreement because of the provisions of s. 70 of the *Saint John City Assessment Act, 1948*, c. 137, Statutes of New Brunswick 1948, the provisions of which will be cited later. It is further contended that, even apart from s. 70, the appellant had no authority to make the agreement.

It is necessary, for the consideration of this submission, to consider chronologically certain of the statutory provisions relating to the supply of water by the appellant. In 1914 there was enacted, as c. 83 of the Statutes of New Brunswick 1914, *An Act to Consolidate the Laws Relating to Sewerage and Water Supply, in the City of Saint John, and in Portions of the Parishes of Lancaster and Simonds.* The relevant portions of that statute, which will hereinafter be referred to as the "1914 Act", were as follows:

1. In this Act the expression "City" shall mean the City of Saint John.

"Commissioner" shall mean the Commissioner of Water and Sewerage of the City of Saint John.

Section 1 further defined "Water District" as including the whole of the City of Saint John and certain defined portions of the Parishes of Lancaster and Simonds.

4. The city is hereby authorized to take, hold and appropriate and to convey through the Parishes of Lancaster and Simonds to, into and through the Water District, all the water of Menzie's Lake, Ludgate's Lake and Spruce Lake, so called, in the Parish of Lancaster, and of Loch Lomond, Lake Robertson, Mispec River, Lake Latimer, and Little River in the Parish of Simonds, and the waters which may flow into and from the same, and any other ponds and streams within the distance of four miles from the same, and any water rights connected therewith; and also to take and hold, by purchase, expropriation or otherwise, any lands or real estate necessary for creating lakes and reservoirs, and for laying up and maintaining pipes, mains and conductors of water for carrying, discharging, disposing of and distributing water, and also any land on and around the margin of the said lakes, reservoirs and river, and on and around the said other ponds and streams, so far as may be necessary for the preservation and purity of the same, for the purpose of furnishing within the said Water District a supply of pure water, and the said City, for the purpose aforesaid, may connect the waters of any of said lakes together, may erect and maintain dams to raise and retain the water therein, may distribute the water throughout the Water District, and may supply and dispose of the same by agreement, outside of said Water District, and for these purposes may lay down pipes to any house or building within the said Water District, and may regulate

the use of the said water within and without the said Water District; and the said City, for the purposes aforesaid may, within and without said Water District, carry any pipes under or about any highway or other way, in such manner as not to obstruct or impede travel thereon, and may enter upon and dig up any such road, street or way, for the purpose of laying down pipes beneath the surface thereof, or of repairing them when laid down, not obstructing or impeding travel as aforesaid, and in general may do any other acts and things necessary, convenient or proper for the purposes of this Act.

5. In supplying water to any company or companies, corporation or corporations, or any individual or individuals, either within or without the said Water District, for the purpose of carrying on manufacturing, or a manufacturing business, or that may be supplied to any factory and factories, mill and mills, manufactory and manufactories, or other building used for manufacturing purposes, the amount of water provided may be as large in quantity and may be furnished at such rates, and upon such terms, conditions and limitations as the City shall determine, by resolution of Common Council, upon petition of any such person or corporation, but such resolution shall not be, nor shall it be construed to be a contract to supply water, and the City shall not be entitled to increase such rates for a period not exceeding twenty-five years, to be set forth in such resolution, and all the rules and regulations concerning the water supply of the said Water District now lawfully made, or that hereafter may lawfully be made, shall apply and extend to the said petitioners and each of them, and their and each of their successors, and the said premises and the said business carried on therein, and to all persons and corporations using such water, to the full extent that such rules and regulations are or may or can be applicable thereto, and the said City is hereby authorized and empowered to make such rules and regulations with regard to supplying water to and the use of the same by the said petitioners, or any of them, or their successors, both within and without said water district, as the said City may deem necessary and expedient.

* * *

29. The Councillors of the Parishes of Lancaster and Simonds, representing such Parishes in the Municipal Council of the City and County of Saint John shall, as such Councillors, represent their said respective Parishes at all meetings of the Common Council of the City of Saint John at which rates are fixed or any matters are considered appertaining to the supply of water within their respective Parishes. Each Councillor shall have one vote, and each member of the Common Council shall have three votes at such meetings. The said Councillors shall vote only upon the fixing of rates and upon matters appertaining to the supply of water within their respective Parishes.

30. Within the Water District, the owners in fee or the leaseholders, either in perpetuity or for renewable terms of any lands or tenements through or along which, or within seven hundred feet of which mains for the supply of water shall pass, and also the owners of or traders in all stocks in trade, wares and merchandize in the said Water District shall, whether the water be taken or used on the premises respectively or not, be assessed for the purpose of this Act, in each year, at a rate and rates to be fixed and determined by a majority of the Common Council of said City with the Councillors of the said respective Parishes, as provided by the thirtieth section of this Act, in each year in their discretion according to the Schedule (B) appended to this Act, and being part thereof, and when pipes for the supply of water are laid to any premises

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then, at a rate and rates to be fixed and determined by the said Common Council with the Councillors as aforesaid, in each year in their discretion, according to the Schedule (C) also appended to this Act, and being part thereof, excepting steam mills, manufactories, public baths, hotels, and all places for which and where a large quantity of water is required, which shall be rated by agreement with the Commissioner and the parties requiring supply, and which shall be payable quarterly. The owner of a dwelling house or other occupied building, in front or along which, or in any street or thoroughfare near to which a main for the supply of water shall pass shall, whether the water be taken or used upon or in the premises or not, be assessed at the same rate according to Schedule (C) of this Act, as if service pipes for the supply of water were laid to such premises and the water actually taken and consumed thereon; provided only that the Commissioner shall have a discretionary power, partly or wholly to exempt any such owner as last mentioned when, in his opinion, it may be impracticable or very expensive to introduce the water into the premises, and in such case may decline to carry in a service pipe. Property owned by the City shall not be liable to assessment against the City. In making up the assessment hereunder, the valuation of real estate within the City made by the Board of Assessors of Taxes for the said City in the year in which such assessment for water supply is made, shall be adopted so far as it may be practicable to do so.

The reference in s. 30 to "the thirtieth section of this Act" is clearly an error. The reference should have been to the twenty-ninth section of the Act.

At the time this Act was passed the Common Council of the City of Saint John consisted of a Mayor and four Elective Commissioners, each Commissioner being responsible for certain aspects of City administration, one of whom was the Commissioner of Water and Sewerage referred to in the 1914 Act. In 1936 this form of government was changed, the Commissioners being replaced by six Councillors, by c. 94, Statutes of New Brunswick 1936. Section 14 of that Act provided as follows:

14. (1) Subject to the further provisions of this Act, the Common Council shall exercise all the powers formerly vested in the Commissioner of Finance and Public Affairs, the Commissioner of Public Safety, the Commissioner of Public Works, the Commissioner of Water and Sewerage (save and except that such powers and duties as are vested in the Commissioner of Water and Sewerage by Chapter 83 of 4 George V (1914), An Act to Consolidate the Laws Relating to Sewerage and Water Supply, in the City of Saint John, and in portions of the Parishes of Lancaster and Simonds, in the City and County of Saint John, and amendments thereto, shall be vested in and exercised by the Director of the Department of Water and Sewerage) and the Commissioner of Harbours and Ferries and Public Lands.

(2) For the more efficient administration of the municipal services the Common Council shall with all convenient speed organize and co-ordinate the following departments:

* * *

(*b*) The Department of Assessment, or Board of Assessors of Taxes, in respect to the management of the levying and assessing of rates and taxes, subject to the provisions of the Saint John City Assessment Act;

* * *

(*g*) The Department of Water and Sewerage, in respect to the management of water supply and sewage disposal;

* * *

(3) The Common Council shall appoint a person having suitable qualifications to be administrative head of each such department and known as the "Director" or as he may be otherwise called by the Common Council. Such person shall devote his whole time to the business of the City and be paid a salary to be determined by the Common Council. He shall hold his appointment during the pleasure of the Common Council, and be responsible to the Common Council for the efficient administration of the services entrusted to him or his department.

(4) It shall be the duty of such administrative head of each department, in addition to such other duties as may be prescribed by the Common Council, to attend the meetings of the Council when and as required to do so by it, and to recommend to it from time to time such measures as he shall deem necessary or expedient for it to adopt. He shall furnish any information respecting his department when required by the Council, and at least once a month present to the Council a summary report on the administrative work of his department.

Following the enactment of this statute, therefore, those powers which, under the 1914 Act, had been vested in the Commissioner of Water and Sewerage became vested in the Director of Water and Sewerage. Unlike the Commissioner, who had been an elected officer and a member of the Common Council, the Director was an appointed official, appointed by the Common Council, holding his appointment during the pleasure of the Common Council and responsible to it.

It is against this background that in 1942 s. 55 of the *Saint John City Assessment Act, 1942*, c. 80, Statutes of New Brunswick 1942, was enacted. This statute dealt with the assessing and levying of rates for taxes in the City, dealing with such matters as the assessment and taxation of real estate, personal property and business, providing a machinery for the making of assessments and for appeals therefrom. One portion of the Act is headed "ASSESSORS' DEPARTMENT", and s. 37 provides for a Board of Assessors of Taxes for the City of Saint John, consisting of one or more persons to be appointed by the Common Council. Section 55 of that Act provided as follows:

55. Notwithstanding anything contained in the Acts of Assembly 4 Geo. V. (1914) Chapter 83 and amendments thereto, all rates, assessments and agreements for water supply within or without the City of Saint John shall be made by the Assessment Department under the

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direction and control of the Director of that department, but all provisions of said Act and Acts mentioned and all amendments thereto, not inconsistent with this Act are to be construed as still in force and effect.

In 1948 the 1942 Act, as amended from time to time, was consolidated in the *Saint John City Assessment Act, 1948,* in which there appeared s. 70 in the same terms as s. 55 of the 1942 Act above quoted. It is upon this section that the appellant chiefly relies, in contending that the agreement between the appellant and the respondent was void and of no effect.

The appellant's contention is that, after the enactment of s. 55 of the 1942 Act, only the Assessment Department of the appellant had the power to impose rates and assessments for water supply and to make agreements for such supply. This involves the contention that the effect of s. 55 was to repeal, by implication, s. 5 of the 1914 Act. It is said that, since s. 55 covered all rates, assessments and agreements for water supply, no powers remained in the Common Council, under s. 5, to make provision for the supply of large quantities of water to factories, mills, manufactories and buildings used for manufacturing purposes; that all such powers now reside solely in the Assessment Department, under the direction of the Director of that Department; that as the respondent's agreement was not made with the Assessment Department, it had no effect, and the Assessment Department, on the direction of the Director, had the authority to impose the rate of five cents per thousand gallons of water delivered to the respondent from the appellant's Loch Lomond system.

I am unable to agree with this submission. Read against the background of the earlier legislation, it does not appear to me that s. 55 of the 1942 Act was ever intended to do anything more than to transfer to the Assessment Department those powers which, prior thereto, had been exercised by the Director of the Department of Water and Sewerage and which, before 1936, had been exercised by the Commissioner of Water and Sewerage, together with the power of assessment and rate determination which, under s. 30 of the 1914 Act, had been vested in the Common Council of the appellant, with, in some instances, the Councillors of the Parishes of Lancaster and Simonds.

Under the 1914 Act, s. 30 was the one which made provision for assessment for water rates, for the fixing of such rates and, in the case of steam mills, manufactories, public baths, hotels and places where a large quantity of water is required, for the fixing of rates by agreement with the Commissioner. Section 5 was a special provision enabling the Common Council, by resolution, to make provision for water supply to factories, mills, manufactories and buildings used for manufacturing purposes, in large quantities and at special rates.

It is significant that the power conferred upon the Assessment Department appears in the *Assessment Act* and not in a statute which amends the 1914 Act. The *Assessment Act* is dealing specifically with the making of assessments and the imposition of rates. I cannot conceive that the Legislature, without any reference whatever to the wide powers of the Common Council conferred by s. 5 of the 1914 Act, and with no repeal thereof, can be deemed to have repealed s. 5 by implication and to have given those broad discretionary powers conferred upon the Common Council to a City Department, under the direction of a departmental head who is, himself, appointed by and responsible to the Common Council.

Attention must also be paid to the saving provision which appears at the end of s. 70 of the 1948 Act: "but all provisions of said Act and Acts mentioned and all amendments thereto, not inconsistent with this Act are to be construed as still in force and effect." The only provisions of the 1914 Act which could be preserved by this saving clause are those contained in s. 5 and, in my opinion, they were preserved by it.

I am, therefore, of the opinion that s. 70 of the *Saint John City Assessment Act, 1948* did not confer upon the Assessment Department the power to make the kind of agreement which is in question here and that it did not prevent the appellant, by its Common Council, from determining rates in relation to those special cases which are provided for in s. 5 of the 1914 Act.

The next submission of the appellant is that, in any event, s. 5 of the 1914 Act does not contemplate nor authorize the execution by the appellant of any agreement. Re-

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liance is placed on the words in that section "but such resolution shall not be, nor shall it be construed to be a contract to supply water".

Section 5 of the 1914 Act enables the appellant, by resolution of its Common Council, to arrange for the supply of water to factories, mills, manufactories and buildings used for manufacturing purposes, in as large a quantity, at such rates and upon such terms, conditions and limitations as the resolution provides. The only limitation is that the resolution shall not be, nor be construed to be, a contract to supply water. The rates set by such resolution cannot be increased for the period set forth in the resolution, not exceeding twenty-five years. The purpose of the restrictive provision in this section is to prevent the City from becoming obligated as a matter of contract by such a resolution to supply water and thereby to prevent an action in damages against the appellant in the event that it is unable to supply the quantities provided for in the resolution.

The respondent points out that s. 5 does not, by its terms, preclude the appellant from making a contract, but merely provides that the resolution itself shall not constitute a contract to supply water. The respondent further contends that the appellant, as a Royal Charter corporation, had, in law, the right to make any contracts which it saw fit to make, provided that the same were not illegal.

Whether or not this contention is sound, I agree with McNair C.J. in the Court below that the resolution of the Common Council, passed on October 17, 1957, agreeing in principle to the agreement between the appellant and the respondent, which had been discussed at that meeting and which is set forth in the minutes of the meeting, coupled with the resolution authorizing the execution of the agreement passed on October 8, 1958, with which resolution that agreement must be read, constitute a resolution of the kind provided for in s. 5 of the 1914 Act, and that thereafter the appellant was not entitled to increase the rates, during the twenty-five year period, above those provided by the resolution.

Finally the appellant contended that, as the respondent's mill was in Lancaster and as the agreement related to the supply of water there, the meeting which passed the resolu-

tion was not properly constituted, as there were no Councillors present from the City of Lancaster as required by s. 29 of the 1914 Act.

In my view, s. 29 is to be read in conjunction with s. 30 and the joint meetings provided for in s. 29 relate only to those matters provision for which is made in s. 30; i.e., the assessment and imposition of water rates. Section 5 of the 1914 Act, in my opinion, stands by itself and deals with a special situation. By its terms it refers only to a resolution of the Common Council of the City of Saint John, and, in my opinion, that Common Council alone has the power to pass a resolution for the purposes of that section. It could do so without the presence of any Councillors from the other municipalities whose territory is within the Water District.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: H. D. Hopkins and J. P. Barry, Saint John.

Solicitors for the defendant, respondent: W. E. Clarke, Saint John. 1963 ACR 304

JAMES FREDERICK SCOTT .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

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*Jan. 28, 29
April 1

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Agreements for sale, lease-option agreements and mortgages purchased at a discount and held to maturity—Whether profits taxable income or capital gain—Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4 and 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).

The appellant, a barrister and solicitor, was found liable for income tax on certain discounts received in the years 1950 to 1955 inclusive. These receipts came from his purchase of agreements for sale of land, lease-

*PRESENT: Taschereau, Fauteux, Judson, Ritchie and Hall JJ.

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option agreements on land and mortgages on land. He purchased at a discount and held the securities to maturity. Most of the agreements covered small house properties in outlying districts where mortgage institutions would not normally do business. The source of funds from which the agreements were purchased was the sale of certain houses and other assets owned by the appellant. As payments were made on the agreements, the appellant used these funds for further purchases. He also operated with a bank loan under which his maximum liability was $100,000. The issue was whether the discounts when received were taxable income or accretions to capital. The Exchequer Court having held that they were taxable income, the appellant appealed to this Court.

Held: The appeal should be dismissed.

For the reasons given by the Exchequer Court the appeal failed. It was true that the appellant purchased the agreements by himself and never in association with anyone else, and that he did not set up any organization for their acquisition. He was not in the business of lending money nor in the business of buying and selling agreements. That there was an element of risk in the transactions was obvious. Nevertheless, the facts established that the appellant was in the highly speculative business of purchasing these agreements at a discount and holding them to maturity in order to realize the maximum amount of profit out of the transactions. The profits were taxable income and not a capital gain.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], holding that certain discounts received by the appellant were taxable income. Appeal dismissed.

T. J. Hopwood, for the appellant.

D. S. Maxwell, Q.C., and *G. W. Ainslie,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—Both the Tax Appeal Board and the Exchequer Court[1] have found the appellant liable for income tax on certain discounts received in the years 1950 to 1955 inclusive. These receipts came from his purchase of agreements for the sale of land, lease-option agreements on land and mortgages on land. He purchased at a discount and held the securities to maturity. The issue is whether the discounts when received by him were taxable income or accretions to capital. The judgment of the Exchequer Court holds that they were taxable income and, in my respectful opinion, for the reasons given by Thorson P., the appeal fails.

[1] [1961] C.T.C. 451, 61 D.T.C. 1285.

There has been a line of six cases on this problem in the Exchequer Court beginning in 1957 with the case of *Arthur Cohen v. Minister of National Revenue*[1]. There the accretion was held to be capital in the case of a retired businessman who disposed of many of his investments and put his capital into mortgages which he purchased at a discount. In the next five cases including the present one: *Minister of National Revenue v. Louis W. Spencer*[2]; *James F. Scott v. Minister of National Revenue*[3]; *Minister of National Revenue v. Beatrice Minden*[4]; *Minister of National Revenue v. Philip Mandelbaum and Albert Mandelbaum*[5]; *Minister of National Revenue v. Henry S. Rosenberg*[6], the contrary conclusion was reached. The discounts when received were held to be taxable because the securities were acquired not as investments but as a scheme of profit-making and, consequently, taxable as income from a business. However, in the latest case, *Minister of National Revenue v. William Hedley MacInnes*[7], the judge concluded that the taxpayer was engaged in investment and not in a scheme for profit-making.

This diversity of opinion is understandable when the decision must depend upon a full review of the facts in each case for the purpose of determining whether the discounts can be classified as income from a business. Even on the same facts, there is room for disagreement among judges on the conclusions that should be drawn from these activities of a taxpayer, for the Act nowhere specifically deals with these discounts, as it does, for example, in s. 105(*a*) with shares redeemed or acquired by a corporation at a premium. It is possible to deal expressly with the problem and the Act has not done so.

The appellant is a barrister and solicitor practising in the City of Calgary. At the time of the appeal to the Exchequer Court he was 69 years of age and had been practising for 47 years. His income from his practice during the years in

[1] [1957] Ex. C.R. 236, [1957] C.T.C. 251, 57 D.T.C. 1183.
[2] [1961] C.T.C. 109, 61 D.T.C. 1079.
[3] [1961] C.T.C. 451, 61 D.T.C. 1285.
[4] [1962] C.T.C. 79, 62 D.T.C. 1044.
[5] [1962] C.T.C. 165, 62 D.T.C. 1093.
[6] [1962] C.T.C. 372, 62 D.T.C. 1216.
[7] [1962] C.T.C. 350, 62 D.T.C. 1208.

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question was approximately $12,000 a year. In 1945, he purchased a ranch and was operating it in a fairly substantial way at the time of the appeal. Nothing in this appeal turns on his activities as a rancher.

The appellant began to purchase these agreements in 1947 and continued until 1955. His explanation for his withdrawal from this activity is that he was getting older and wished to leave a more liquid estate to face estate tax liabilities. From 1947 to 1954 he purchased 149 agreements, particulars of which are as follows:

In 1947	.....	28 agreements
In 1948	.....	17 agreements
In 1949	.....	20 agreements
In 1950	.....	28 agreements
In 1951	.....	20 agreements
In 1952	.....	20 agreements
In 1953	.....	15 agreements
In 1954	.....	1 agreement
Total	.....	149 agreements

Of the 84 agreements purchased in the period 1950 to 1954, there were 70 lease-option agreements, 12 agreements for sale and 2 first mortgages.

Most of the agreements covered small house properties in undeveloped districts on the outskirts of Calgary where mortgage institutions would not normally do business. The properties had been sold with small down payments averaging from 10 to 15 per cent of the full purchase price with 8 to 11 years in which to pay the balance. The appellant only purchased agreements where a discount was offered and these discounts varied from 20 per cent to 40 per cent of the balance of the purchase price. Most of the agreements carried interest at 6 per cent. The going rates of interest at the time on *National Housing Act* mortgages were, first, 4½ per cent and later, 5 per cent, and on other mortgages 5 per cent and later 5½ per cent, but these rates were on loans not exceeding 50 per cent or 60 per cent of the appraised value made by mortgage companies on first class properties. I mention these interest rates because there appears to be no connection between the size of the discount and an unduly low interest rate.

When the appellant purchased an agreement, he obtained a transfer of title from the vendor and an assignment of the agreement and thus became the registered owner of the property, subject only to such caveat as the purchaser or lessee under the agreement might have filed against the title.

The source of funds from which the appellant purchased these agreements was first of all the sale of 25 small houses which he owned before the war and which he sold after the war. He had, in addition, $54,000 in stocks and bonds. As payments were made on the agreements, he used these funds for further purchases. He also operated with a bank loan under which his maximum liability was $100,000.

The appellant purchased these agreements by himself and never in association with anyone else. He did not set up any organization for their acquisition, never employed anyone to purchase agreements for him, never advertised for them and never offered to buy them, nor did he bargain with vendors about the price he would pay. The appellant was approached by building contractors or real estate agents who stated how much they wanted for the agreements and he decided whether he would accept their offer or not. In some cases, the building contractors or real estate agents were clients. Some of the agreements were drawn by his law firm and many were not. The building contractors concerned often had small financial means and when they had sold a house, they had to realize cash on the agreement under which they had sold in order to build another one. The appellant explained that it became known that he was a potential purchaser of such agreements in the first place because of the agreements held by him on the 25 houses originally owned by him and which he had sold.

Sometimes he purchased an agreement from a builder immediately after the builder had sold the house but he never dealt with a builder before the property was sold.

The appellant did not sell any of the agreements purchased by him but kept them all until maturity or until paid off prior to maturity except for some 25 agreements transferred to his ranching company, incorporated under the name of Baha Tinda Stock Farm Ltd., for preference stock equivalent to the balance owing on the agreements transferred.

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SCOTT
v.
MINISTER OF NATIONAL REVENUE

Judson J.

The appellant was clearly not in the business of lending money. He did not lend money at any time. He purchased for less than their face value existing obligations which arose from a sale by a builder to a purchaser. These obligations given back by the purchaser carried a normal rate of interest which was slightly above the rate of interest charged under the *National Housing Act* at the times in question.

There was an obvious element of risk in these transactions. The down payments were small and mortgage companies and other lending institutions were not interested in them. Furthermore, provincial legislation which restricted the owner of the security to reliance upon the security and not upon the personal covenant made it even more risky. The discount is, therefore, explained by the nature of the risk and the needs of the builder who had to sell these obligations to finance further building.

The appellant was not in the business of buying and selling. He bought long-term obligations with small down payments and, with the exception of the transfer of 25 of these obligations to the ranch when it became incorporated in return for preferred shares in the ranch, the appellant never sold any of them. He held them all to maturity with the exception of one or two, on which he had to realize by way of foreclosure or sale.

I have stated the facts with all the emphasis given to them by counsel for the appellant. Nevertheless, I remain in agreement with the judgment of Thorson P. that these facts establish that the appellant was in the highly speculative business of purchasing these obligations at a discount and holding them to maturity in order to realize the maximum amount of profit out of the transactions, and that the profits are taxable income and not a capital gain.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Scott, Gregg, Hopwood & Scott, Calgary.

Solicitor for the respondent: A. A. McGrory, Ottawa.

GERALD HENRY HELLER (*Petitioner*) ..APPELLANT;

1963

*Feb. 18, 19
Mar. 7

AND

THE REGISTRAR, VANCOUVER LAND REGISTRATION DISTRICT } RESPONDENT;

AND

MARY ELIZABETH HELLER .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Real property—Conveyance registered and new certificate of title issued—Registrar erroneously acting under impression he had duplicate certificate of title in his possession—Whether registrar must automatically, on discovering error, cancel new certificate of title—Land Registry Act, R.S.B.C. 1960, c. 208, s. 256.

The respondent presented to the Vancouver Land Registry Office a conveyance, from her husband, the appellant, to herself, of title to certain property. The conveyance was registered and title to the lands in question was issued in her name under a new certificate of title. The conveyance was registered under the erroneous impression that the appellant's duplicate certificate of title was lodged at the registry office. The appellant's solicitor later wrote to the registrar requesting that the certificate of title issued to the respondent be cancelled and that the cancellation stamp on the appellant's certificate of title be removed. The registrar refused to comply with this request and the husband then filed a petition, by way of appeal, in the Supreme Court of British Columbia, which petition was granted. An appeal to the Court of Appeal, argued on an agreed statement of facts substantially different from what had been alleged in the petition, was allowed and the petition was dismissed.

Held: The appeal should be dismissed.

Section 256 of the *Land Registry Act* enables the registrar to exercise a limited power of cancellation, or correction, where he discovers that error has occurred. The power thus conferred on him is one which he is authorized to exercise at his discretion. There is no provision in the section for an application to the registrar by an interested party, nor is there any direction that, upon such application, the registrar shall proceed to exercise his powers. This was not, therefore, a provision which imposed a duty to exercise the power to enforce the right of a party, such as was mentioned by Lord Blackburn in *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 241.

The registrar's powers were limited by the words "so far as practicable, without prejudicing rights conferred for value". Although it appeared that the consideration stated in the conveyance from the appellant to the respondent was the sum of $1, the registrar would not, without receiving additional evidence, be in a position to know, merely by

*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

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looking at the conveyance itself, whether the rights conferred upon the respondent by the conveyance were for value or not. It was no part of the function of a registrar, under this section, to adjudicate upon contested rights of parties, for the determination of which it would be necessary for him to hear, receive and weigh evidence. He can only act upon the material which is before him in his own records.

The error in the present case was not in relation to the issuance of a title according to the tenor of the transfer, but was in respect of the failure to have required the production of the duplicate certificate of title of the appellant (s. 157). *C.P.R. and Imperial Oil Ltd. v. Turta*, [1954] S.C.R. 427, distinguished. There was nothing before the registrar, on his own records, to indicate whether or not that duplicate certificate of title was available and would be produced by the respondent. Any information which he had in that regard could only be obtained on the basis of outside evidence submitted by the appellant, which might be contested by the respondent.

Under s. 35, as between the appellant and the transferee, the conveyance had become operative. Furthermore, under s. 159, the holder of any duplicate certificate of title covering land for which he has given a conveyance or transfer is required to deliver up his duplicate certificate of title to the registrar. The appellant's position was, therefore, that in order to obtain redress as against the respondent, he would have to establish, by evidence, that there had been an incomplete gift, that there had been no delivery of the deed, or that there was fraud on the respondent's part, any of which issues, could not properly be determined by a registrar, under the provisions of s. 256, but which could only be determined by an action in court.

Finally, although the point was not argued in this Court, nor in the Courts below, and consequently without expressing a final opinion, it was doubtful whether the registrar's decision to act, or his refusal to act, under s. 256 was the proper subject-matter of the appeal provisions contained in Part XV of the Act.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Brown J. Appeal dismissed.

Douglas Norby, for the petitioner, appellant.

Miss Mary F. Southin, for the respondent: Mary Elizabeth Heller.

The judgment of the Court was delivered by

MARTLAND J.:—On February 10, 1958, the respondent Mrs. Mary Elizabeth Heller (hereinafter referred to as "the respondent") presented to the Vancouver Land Registry Office a conveyance, from her husband, the appellant, to herself, of title to the lands at that time registered in his name under Certificate of Title 152412L. The stated consideration was $1. The conveyance was registered and title

[1] (1960), 33 W.W.R. 385, 26 D.L.R. (2d) 154.

to the lands in question was issued in her name under Certificate of Title 380035L. The conveyance was registered under the erroneous impression that the appellant's duplicate certificate of title was lodged at the Registry Office.

On January 5, 1959, the appellant's solicitor wrote to the respondent the Registrar of the Vancouver Land Registration District, requesting that the certificate of title issued to the respondent be cancelled and that the cancellation stamp on Certificate of Title 152412L be removed. In this letter it was stated:

> Mr. Heller wishes it to be understood that he is not asking you to adjudicate on the validity of the deed of land to Mrs. M. E. Heller covering the above property.

The Registrar refused to comply with this request and, in his letter in reply, stated, among other things:

> With respect I point out that the said paragraph 2 and paragraph 3 of your letter are contradictions in terms in that I cannot interfere with Mrs. Heller's registration without agreeing with Mr. Heller's contention of fraud on her part, none of which is disclosed by the conveyance itself, nor does the said conveyance give any intimation that even an error has been made in this office.

The appellant then filed a petition in the Supreme Court of British Columbia, by way of appeal from the Registrar's decision, containing a number of allegations, which included the following:

> 2. THAT in the summer of 1949 Your Petitioner was by his physician advised to undergo a serious surgical operation and on the 8th day of August, 1949 drew and duly executed a deed conveying the said property to Mary Elizabeth Heller, Your Petitioner's wife, the consideration mentioned therein was $1.00 but no money actually passed it being Your Petitioner's intention that the conveyance operate as a testamentary instrument if Your Petitioner did not survive the operation.
>
> 3. THAT the said deed was never delivered to Mary Elizabeth Heller but was placed among Your Petitioner's private papers and at no time did the said Petitioner intend to deliver the same.
>
> 4. THAT Your Petitioner on the 30th day of August, 1949, entered into an Agreement for Sale of an undivided one-half interest in the said property and a building to be built thereon, to one W. P. Cuff, which Agreement has not been registered in the Land Registry Office in the said City of Vancouver.
>
> 5. THAT Your Petitioner subsequently caused to be constructed upon the said property a building of the value of approximately $20,000.
>
> 6. THAT by Deed of Land dated the 15th day of July, A.D. 1953, Your Petitioner conveyed a one-half interest in the said property to the said W. P. Cuff.
>
> 7. THAT the Deed of Land mentioned in the preceeding paragraph contained a reference to the said unregistered Agreement for Sale and the said Cuff encountered difficulty in registering the said Deed.

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Martland J.

8. THAT Gordon Johnson, Esquire, Solicitor to the said Cuff requested from Your Petitioner a registrable Deed for the said one-half interest and the Duplicate Certificate of Indefeasible Title numbered 152412L, in pursuance of such request Your Petitioner caused to be delivered to the said Gordon Johnson the said Certificate to be held by him pending and for the purpose of the registration of the said Cuff's interest in the said property.

9. THAT the said Mary Elizabeth Heller was at all times cognizant of the aforesaid agreements.

10. THAT on or about the 10th day of February, A.D. 1958, the said Mary Elizabeth Heller without Your Petitioner's knowledge or consent and in some manner unbeknownst to Your Petitioner became possessed of the Deed above mentioned, and caused the same to be registered in the said Land Registry Office from which office, in due course, issued a Certificate of Indefeasible Title numbered 380035L citing the said Mary Elizabeth Heller as the registered owner of the said property.

This petition was supported by an affidavit of the appellant in which he swore that he verily and truly believed the statements set out in the petition were true and correct in substance and fact. It was heard by Brown J., who, according to his formal order, heard evidence, and who ordered the Registrar to cancel Certificate of Title 380035L and to remove the cancellation stamp from Certificate of Title 152412L.

From this order the respondent appealed to the Court of Appeal for British Columbia. Before that Court it appears that for the first time a statement of facts was agreed upon, on the basis of which the Court directed the appeal to proceed. Included in the statement of facts is the following material:

> It was also alleged by the Petitioner (Respondent) that the deed was an attempted testamentary disposition but it was agreed between Counsel in the Court Below that the question of delivery or non-delivery of the deed was not in issue.
>
> So far as the Registrar of Titles was concerned he had before him a deed valid and duly delivered on its face which complied with the requirements of the "Land Registry Act".
>
> It is not suggested that the Appellant knew that the duplicate certificate of title was not in the Registry nor is it suggested in these proceedings that she was guilty of any fraud in applying to register this deed.

The respondent's appeal was allowed and the appellant's petition was dismissed with costs[1].

The situation, therefore, exists that, whereas Brown J. dealt with a petition which contained the allegations previously cited, supported by affidavit, the appeal to the

[1] (1961), 33 W.W.R. 385, 26 D.L.R. (2d) 154.

Court of Appeal was argued on an agreed statement of facts substantially different from what had been alleged in the petition itself.

Leave to appeal to this Court was refused by the Court of Appeal for British Columbia. On a motion before this Court for leave to appeal, it was not disputed by counsel that the amount in issue exceeded $10,000 and consequently it became unnecessary to consider whether or not leave should be granted. It was not until the argument of the appeal itself that it first became apparent that, as the issues of delivery of the deed to, and the fraud of, the respondent were not in issue before the Court of Appeal, the rights of the parties had not finally been determined by its judgment. In the circumstances it was felt that, the matter having proceeded as far as it had, leave should be granted to the appellant in order that the submissions of the parties might be heard.

It is, however, at once apparent that a judgment of this Court in the present proceedings, in their existing form, could not finally determine the rights of the parties if the appeal fails, since there would still remain serious issues as between the parties which had not been before either the Court of Appeal or this Court. The Court, therefore, finds itself in the position where, in the light of what occurred before the Court of Appeal, it cannot determine the issues on the basis on which, according to the petition, they were presented before the learned trial judge, and that it is being asked to determine the question, which is really hypothetical, as to whether, under the British Columbia *Land Registry Act*, a Registrar, who, erroneously acting under the belief that he has in his possession a duplicate certificate of title, registers a conveyance and issues a new certificate of title, must automatically, on discovering his error, cancel the new certificate of title under the powers conferred upon him by s. 256 of the *Land Registry Act*, R.S.B.C. 1960, c. 208. Throughout these reasons I will be referring to those section numbers which appear in the Act as it presently stands, rather than to the numbers which existed at the time these proceedings were commenced, as the sections which require consideration are identical in their wording with the sections which appeared in R.S.B.C. 1948, c. 171, although not having the same numbering throughout the Act.

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v.
REGISTRAR, VANCOUVER LAND REGISTRATION DISTRICT *et al.*

Martland J.

Section 256 provides as follows:

256. If it appears to the Registrar

(*a*) that any instrument has been issued in error or contains any misdescription; or

(*b*) that any entry, memorandum, or endorsement has been made in error or has erroneously been omitted to be made on any register or any instrument; or

(*c*) that any registration, instrument, entry, memorandum, or endorsement was fraudulently or wrongfully obtained,

and whether the instrument is in his custody or has been produced to him under summons, the Registrar may, so far as practicable, without prejudicing rights conferred for value, cancel the registration, instrument, entry, memorandum, or endorsement, or correct the error in the register or instrument or any entry, memorandum, or endorsement made thereon, or in any copy of any instrument made in or issued from the Land Registry Office, and may supply entries omitted to be made. In the correction of any error the Registrar shall not erase or render illegible the original words, and he shall affix his initials thereto and the date upon which the correction was made or entry supplied. Every register or instrument so corrected, and every entry, memorandum, or endorsement so corrected or supplied, has validity and effect as if the error had not been made or the entry omitted. Every cancellation of an instrument, entry, memorandum, or endorsement under this section has validity and effect as from the issuing of the instrument or the making of the entry, memorandum, or endorsement.

In my opinion the appeal should be dismissed.

In the first place, the power conferred on the Registrar by this section is one which he is authorized to exercise at his discretion. The section provides that, if it appears to the Registrar that certain things have occurred, he "*may*" do certain things. There is no provision in the section for an application to the Registrar by an interested party, nor is there any direction that, upon such an application, the Registrar shall proceed to exercise his powers. This is not, therefore, a provision which imposed a duty to exercise the power to enforce the right of a party, such as is mentioned by Lord Blackburn in *Julius v. Lord Bishop of Oxford*[1]. The section, which is similar to like provisions in other statutes in Canada creating a Torrens system of titles, is one which enables a Registrar to exercise a limited power of cancellation, or correction, where he discovers that error has occurred.

In the second place, his powers are limited by the words "so far as practicable, without prejudicing rights conferred for value". Although it appears that the consideration stated in the conveyance from the appellant to the respondent was

[1] (1880), 5 App. Cas. 214 at 241.

the sum of $1, the Registrar would not, without receiving additional evidence, be in a position to know, merely by looking at the conveyance itself, whether the rights conferred upon the respondent by the conveyance were for value or not. In my opinion, it is no part of the function of a Registrar, under this section, to adjudicate upon contested rights of parties, for the determination of which it would be necessary for him to hear, receive and weigh evidence. He can only act upon the material which is before him in his own records.

I realize that the provisions of para. (*c*) of s. 256 may appear to be inconsistent with this conclusion. That paragraph relates to a situation where "any registration, instrument, entry, memorandum, or endorsement was fraudulently or wrongfully obtained". If, however, these words were to be construed in their widest sense, so as to enable a Registrar to act, under the section, upon evidence submitted to him upon which he could make a finding of fraud, I would have grave doubts as to whether this provision could be held to be *intra vires* of the Legislature of British Columbia. So construed, the Registrar would be clothed with an original jurisdiction to determine questions of title to land in relation to which fraud had been alleged (*Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd. et al.*[1]).

The present case is in no way comparable, on its facts, to the situation which had arisen in *C.P.R. and Imperial Oil Ltd. v. Turta*[2], at the stage where the transfer from the C.P.R. to Podgorny had been registered. In that case the error which had arisen was the issuance of a title to land, including certain minerals, in the name of Podgorny, when the transfer to him from the C.P.R., which gave rise to his title, had specifically reserved them to the C.P.R. The error was apparent on the face of the records in the Land Titles Office. In the present case the title issued to the respondent was that which the conveyance provided for. The error was not in relation to the issuance of a title according to the tenor of the transfer, but was in respect of the failure to

[1] [1960] S.C.R. 32, 21 D.L.R. (2d) 97.
[2] [1954] S.C.R. 427, 3 D.L.R. 1.

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Martland J.

have required the production of the duplicate certificate of title of the appellant. Section 157 of the Act provides:

> 157. Where a conveyance or transfer is made of any land the title to which is registered, the grantee or transferee is entitled to be registered as the owner of the estate or interest held by or vested in the former owner to the extent to which that estate or interest is conveyed or transferred; and the Registrar, upon being satisfied that the conveyance or transfer produced has transferred to and vested in the applicant a good safe-holding and marketable title, shall, upon production of the former certificate or duplicate certificate of title, register the title claimed by the applicant in the register.

There was nothing before the Registrar, on his own records, to indicate whether or not that duplicate certificate of title was available and could be produced by the respondent. Any information which he had in that regard could only be obtained on the basis of outside evidence submitted by the appellant, which might be contested by the respondent.

In the third place, I do not see how a party, who has executed and delivered a conveyance (and, on the basis of the agreed statement of facts before the Court of Appeal, delivery was not in issue), but who has failed to deliver the duplicate certificate of title to the transferee, is in any position to complain of the conduct of the Registrar in respect of the registration of that conveyance without proof of further facts. Under s. 35 of the Act, as between himself and the transferee, the conveyance had become operative. Furthermore, under s. 159, it is provided:

> The holder of any duplicate certificate of title covering land for which he has given a conveyance or transfer shall deliver up his duplicate certificate of title to the Registrar. . . . .

The appellant's position was, therefore, that, in order to obtain redress as against the respondent, he would have to establish, by evidence, that there had been an incomplete gift, that there had been no delivery of the deed, or that there was fraud on the respondent's part, any of which issues, in my opinion, cannot properly be determined by a Registrar, under the provisions of s. 256, but which can only be determined by an action in court.

Finally, I have some question in my mind as to whether a decision of the Registrar not to act under s. 256 can properly be the subject of an appeal under the provisions of Part XV of the Act. This point was not argued before us, nor in the Courts below, and consequently I would not wish to express a final opinion with respect to it. I note, however,

that the provisions dealing with appeals from the Registrar are contained in ss. 235 and 237 of the Act. An appeal under s. 235 arises in respect of a refusal by the Registrar, as described in s. 234(1), which reads as follows:

234. (1) In case the Registrar refuses to issue a certificate of title or to effect registration, renewal, filing, lodging, deposit, or cancellation in accordance with the tenor of any application, he shall forthwith notify the applicant, or the solicitor or agent of the applicant, in writing, of his refusal, stating briefly the reasons therefor and his requirements, and in case a subsequent application is affected by his refusal he shall also similarly notify the subsequent applicant.

Section 237 provides as follows:

237. If any person is dissatisfied with any decision of the Registrar, that is to say, any summary rejection of application, act, omission, decision, direction, or order of the Registrar in respect of any application, other than a refusal of the Registrar to which section 234 applies, he may forthwith require the Registrar to furnish to him, set forth in writing under the hand of the Registrar, the reasons of the decision; and may, within twenty-one days after the receipt by him of the Registrar's reasons, apply to a Judge of the Supreme Court in Chambers upon a petition by way of appeal from the Registrar's decision; and sections 235 and 236 apply in respect of the petition and the proceedings thereon.

It will be noted that s. 234(1) refers only to a refusal of the Registrar to issue a certificate of title or to effect registration, renewal, filing, lodging, deposit, or cancellation *"in accordance with the tenor of any application"*.

Section 237 refers to dissatisfaction with a decision, act or omission of the Registrar *"in respect of any application"*.

It would seem to me that the word "application", though not specifically defined in the statute, relates only to those matters in respect of which the Act gives to a person a right to apply to the Registrar to do something which the Act requires him to do, examples of which are to be found in the forms of application set forth, in Forms A to E inclusive, in the First Schedule to the Act. There is no provision for an application to the Registrar to act under s. 256. I would doubt whether his decision to act, or his refusal to act, under that section is the proper subject-matter of the appeal provisions contained in Part XV of the Act.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the petitioner, appellant: Jestley, Morrison, Eckardt, Ainsworth and Henson, Vancouver.

Solicitors for the respondent, Mary Elizabeth Heller: Ladner and Southin, Vancouver.

1962
*Nov. 15, 16

W. J. CROWE LIMITED (*Defendant*) ..APPELLANT;

AND

1963
**Mar. 7

PIGOTT CONSTRUCTION COMPANY LIMITED (*Plaintiff*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Building subcontract—Trial judge wrong in implying term as to progress of construction to permit commencement of work by subcontractor—Subcontractor not excused from performance by reason of alleged breach of contract by general contractor.

The plaintiff, a general contractor, brought an action to recover damages for non-performance by the defendant of a building subcontract entered into on September 16, 1955. The action was dismissed at trial, but, on appeal, the Court of Appeal held that the plaintiff was entitled to succeed. In the circumstances of the case, the trial judge was wrong in implying a term in the subcontract that work on the project would be sufficiently far advanced to enable the defendant to commence work not later than January 1, 1957. Also, in the particular circumstances of the case, the defendant was not excused from performance of the subcontract by reason of the plaintiff's alleged failure to proceed with the work in a proper and expeditious manner or by reason of its failure to provide temporary heating in the buildings under construction. The defendant appealed from the judgment of the Court of Appeal.

Held: The appeal should be dismissed.

This Court was in full agreement with the reasons for judgment delivered by Laidlaw J.A. on behalf of the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Gale J. Appeal dismissed.

W. B. Williston, Q.C., for the defendant, appellant.

J. J. Robinette, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—After careful consideration of the very thorough arguments of counsel, I have concluded that there is nothing which I can usefully add to the reasons for judgment delivered by Laidlaw J.A. on behalf of the Court of Appeal for Ontario[1] with which I am in full agreement.

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Ritchie JJ.

**Kerwin C.J. died before the delivery of judgment.

[1] [1961] O.R. 305, 27 D.L.R. (2d) 258.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: McLaughlin, Macaulay, May & Soward, Toronto.

Solicitors for the plaintiff, respondent: Day, Wilson, Campbell & Martin, Toronto.

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W. J. CROWE LTD. v. PIGOTT CONSTRUCTION CO. LTD.

Ritchie J.

ROBERT C. KINNAIRD (*Prosecutor*) ....APPELLANT;

AND

THE WORKMEN'S COMPENSATION BOARD (*Respondent*) ..... } RESPONDENT.

1963

*Mar. 7, 8
April 1

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Workmen's compensation—Discontinuance of pension by Board—Examination of workman under medical appeal provision—Notification rejecting appeal—Matters contained in specialist's certificate not included in notification—Application for writ of mandamus with certiorari in aid to quash Board's decision—Workmen's Compensation Act, R.S.B.C. 1960, c. 413.

The appellant contracted dermatitis as a result of his employment as a painter and was granted compensation therefor by the Workmen's Compensation Board from February 1945 until February 1947, when his pension was discontinued and he was advised by the Board that he should obtain employment of a clerical type. At that time there was no medical appeal provision in the *Workmen's Compensation Act*, R.S.B.C. 1936, c. 312, but such a provision was added as s. 54A of the Act by 1955 (B.C.), c. 98, s. 15. In 1956 the appellant applied to the Board, under the provisions of s. 54A, to be examined by a specialist and his application was granted. Some time after the examination the appellant was informed by a letter from the Board that the latter had received the certificate of the specialist. He was further informed that his claim had been reviewed, that the matters contained in the certificate had been fully considered, and that no change had been made in the status or disposition of his claim. An application for a writ of *mandamus* with *certiorari* in aid to quash the decision of the Board was dismissed by Brown J. and his judgment was affirmed by the Court of Appeal, one member dissenting. By leave of the Court of Appeal, an appeal was brought to this Court.

Held: The appeal should be dismissed.

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Hall JJ.

1963

RE KINNAIRD AND WORKMEN'S COMPENSATION BOARD

Per Curiam: The contention that the Board had "declined jurisdiction" by failing to notify the appellant of its decision regarding the matters contained in the specialist's certificate failed. The provisions of s. 54A(9) did not give the workman a right to anything more from the Board than a notification in writing of its decision. The Board had complied with this section, albeit in a most niggardly fashion.

The contention that as s. 54A(5) makes the specialist's certificate "conclusive as to the matters certified" and as the certificate in the present case certified that his disability was "a result of his occupation", the Board had no jurisdiction to do otherwise than to reinstate the appellant's pension in accordance with this finding also failed. This contention overlooked the fact that the specialist's report is initiated on the strength of a physician's certificate "certifying that in the opinion of such physician there is a bona fide medical dispute to be resolved". It is for the purpose of resolving this dispute that the specialist makes his examination and furnishes his certificate to the Board, and it is his opinion as to how this dispute is to be resolved which is embodied in the certificate and made conclusive and binding on the Board by s. 54A(5). The effect of this certificate upon the Board's decision with respect to whether compensation was to be awarded or not was another matter and the fact that the specialist's certificate was not intended to be conclusive in this regard was demonstrated by the provisions of s. 54A(9) which clearly contemplate a review of the whole claim and the making of an independent decision by the Board after the certificate has been received.

Under the provisions of the present s. 77(*d*) (formerly s. 76) of the Act, the Board is given ". . . exclusive jurisdiction to inquire into, hear and determine . . . . (*d*) the degree of diminution of earning capacity by reason of any injury;" and s. 22(1) of the Act provides that when the Board is awarding compensation "regard shall be had to the workman's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business". Accordingly, the Board had jurisdiction to review the appellant's claim in light of the specialist's certificate and to determine that no change should be made in the disposition of his case because of the degree of his fitness to adapt himself to employment at clerical work if he chose to do so. Whether or not this formed the basis of the Board's decision was not for the Court to say. In assessing the effect of the specialist's certificate on the appellant's right to compensation it was within the jurisdiction of the Board to examine all other data available to it for the purpose of determining whether or not the appellant's earning capacity had been diminished as a result of his disability and the fact that the Court was unable, on the material before it, to understand how the Board reached the decision which it did was beside the point. *Farrell v. Workmen's Compensation Board* [1962] S.C.R. 48, followed; *Battaglia v. Workmen's Compensation Board* (1960), 32 W.W.R. 1, distinguished.

Per Hall J.: The appellant did not appear to have received the substantial justice which s. 79 of the Act contemplates. However, the courts are without power to review the merits of the case on *certiorari*. The legislature has given the Board unlimited discretion not subject to appeal or judicial review as long as the Board acts within its jurisdiction.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Brown J. Appeal dismissed.

T. R. Berger, for the appellant.

C. C. Locke, Q.C., for the respondent.

The judgment of Cartwright, Fauteux, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal brought by leave of the Court of Appeal of British Columbia from a judgment of that Court[1] (O'Halloran J.A. dissenting) affirming the judgment of Brown J. whereby he dismissed the appellant's application for a writ of *mandamus* with *certiorari* in aid to quash a decision of the Workmen's Compensation Board of British Columbia, dated March 28, 1957.

The notice of motion by which these proceedings were initiated sought relief upon the following grounds:

1. Workmen's Compensation Board did not notify the Prosecutor in writing of its decision regarding the matters contained in the certificate made in 1957 by Dr. K. Greenwood pursuant to the provisions of section 54A of the Workmen's Compensation Act, and thereby declined jurisdiction.
2. Workmen's Compensation Board neglected or refused to consider the certificate of the specialist appointed pursuant to the provisions of section 54A in 1957 as conclusive as to the matters certified therein, and thereby declined jurisdiction.
3. That the said Board, following receipt of the specialist's certificate, neglected or refused to pay compensation to the Prosecutor, and thereby declined jurisdiction.

The circumstances giving rise to this application are that Robert C. Kinnaird, the prosecutor, contracted dermatitis in December 1944, as a result of his employment as a painter and was granted compensation therefor by the Workmen's Compensation Board from February 1945 until February 1947, when his pension was discontinued and he was advised by the Board that:

> From the medical information now on file it is considered that as far as any disability arising out of your employment with the Newcastle Shipbuilding Co. Ltd. is concerned, it cannot obviously be now considered to be produced by occupational contact, and your claim is therefore terminated this date and a cheque accordingly for time-loss to February 5th inclusive, together with subsistence allowance for January 8th, and transportation, is herewith enclosed.

[1] (1962), 39 W.W.R. 177, 34 D.L.R. (2d) 110.

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RE KINNAIRD AND WORKMEN'S COMPENSATION BOARD

Ritchie J.

It is the belief of this Board that you should immediately apply yourself to the suggestion given you by Dr. Williams and obtain employment, light in nature, clean and of a clerical type.

At this time, there was no medical appeal provision in the *Workmen's Compensation Act*, but by s. 15 of c. 91 of the Statutes of British Columbia, 1955, s. 54A was added to the statute whereby provision was made entitling any workman who disputed a finding of the Board to be examined by a specialist to be nominated by him from a list of specialists provided by the Board. The request initiating such an examination was required to be

> . . . accompanied by a certificate from a physician certifying that in the opinion of such physician there is a bona fide medical dispute to be resolved, with sufficient particulars thereof to define the question in issue.

Under the provisions of s. 54A(5) the specialist so selected was required to report to the Board within 18 days after his appointment, certifying as to:

> (*a*) The condition of the workman;
> (*b*) His fitness for employment;
> (*c*) If unfit, the cause of such unfitness;
> (*d*) The extent of his temporary or permanent disability by reason of the injury in respect of which he has claimed compensation; and
> (*e*) Such other matters as may, in his opinion, or in the opinion of the Board, be pertinent to the claim;
>
> and such certificate, which shall be in the form provided by regulation, *shall be conclusive as to the matters certified.* (The italics are mine.)

On September 15, 1956, the appellant decided to take advantage of the provisions of this section and applied to the Board in writing to be examined by a specialist, enclosing a certificate of a physician certifying that in his opinion there was a *bona fide* medical dispute to be resolved. Upon this application being granted, the appellant nominated Dr. Greenwood as the specialist to conduct the examination and the examination was conducted on January 29, 1957. Dr. Greenwood furnished the Board with his certificate in accordance with s. 54A(5) on February 1, 1957, in which he reported as follows:

> (*a*) Examination of the skin revealed a mild non-specific eczematous process involving the fingers, with some active vesiculation. Occasional similar lesions are present also on the feet. The skin appears otherwise clear.

(*b*) This patient is temporarily unfit for work, on account of his recent coronary attacks. The exceptionally sensitive condition of his skin precludes him from any occupation except for dry, clean work such as clerical work. He is unfit to continue in his two trades, namely, painting and baking.

(*c*) This unfitness is due to the skin having been previously severely sensitized as a result of his occupation.

(*d*) The skin in itself would constitute very little disability to an individual employed in clerical work. This man, however, is permanently unfit for either of his two trades. He also states that his educational attainments do not fit him for any other more suitable job.

(*e*) I would estimate that there is an element of resentment in this case, and that this psychological factor may well be responsible for the recalcitrance of the disease process. It is not possible to say whether or not the patient could have employed himself in a non-irritating occupation, had this "negative" attitude been absent.

Under the provisions of s. 54A(9) the Board is required "within eighteen days of the receipt of the certificate from the specialist . . . ." to "review the claim and notify the workman in writing of its decision regarding the matters contained in such certificate".

The notification which the appellant received from the Board pursuant to this section is contained in a letter dated March 28, 1957, which reads as follows:

> The certificate of the specialist nominated by you for examination under Section 54A of the Workmen's Compensation Act has been received.
>
> Your claim has been reviewed by the Board and the matters contained in the certificate fully considered and this is to inform you that no change has been made in the status or disposition of your claim.

It is contended on behalf of the appellant that the Board "declined jurisdiction" by failing to notify him of its decision regarding the matters contained in the specialist's certificate, and although I am bound to say that, in my opinion, it would have been more humane and more businesslike for the Board to have furnished the appellant with a copy of the certificate and an explanation of its decision, I am nevertheless unable to find that the provisions of s. 54A(9) give the workman a right to anything more from the Board than a notification in writing of its decision, and it seems to me that the Board complied with this section, albeit in a most niggardly fashion, when it advised the appellant in its letter of March 28, 1957, that after reviewing his claim and having given full consideration to the certificate it had decided that there was no change in the disposition of his claim.

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Ritchie J.

It is contended, however, that as s. 54A(5) makes the specialist's certificate "conclusive as to the matters certified" and as the certificate in the present case certifies that his disability is "a result of his occupation", the Board had no jurisdiction to do otherwise than to reinstate the appellant's pension in accordance with this finding.

This contention appears to me to overlook the fact that the specialist's report is initiated on the strength of a physician's certificate "certifying that in the opinion of such physician there is a bona fide medical dispute to be resolved . . .". It is for the purpose of resolving this dispute that the specialist makes his examination and furnishes his certificate to the Board, and it is his opinion as to how this dispute is to be resolved which is embodied in the certificate and made conclusive and binding on the Board by s. 54A(5). The effect of this certificate upon the Board's decision with respect to whether compensation is to be awarded or not is quite another matter and, in my view, the fact that the specialist's certificate is not intended to be conclusive in this regard is demonstrated by the provisions of s. 54A(9) which clearly contemplate a review of the whole claim and the making of an independent decision by the Board after the certificate has been received. If the specialist's certificate were intended to be conclusive of the workman's right to compensation, there would be no room for the jurisdiction to review and decide which the Board is required to exercise under s. 54A(9).

In the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal, Davey J.A. expressed the following opinion:

> In my opinion it is possible that the Board may have accepted Dr. Greenwood's certificate but still have concluded, rightly or wrongly, on law or facts falling within the Board's exclusive jurisdiction that the opinion certified did not entitle the appellant to restoration of his compensation.

Counsel for the appellant treated this passage as meaning that the Court of Appeal required the appellant to prove his case to the exclusion of all possibilities instead of in accordance with the preponderance of evidence. I do not, however, think that any problem concerning burden of proof is raised by the above-quoted passage or that Davey J.A. was doing more than saying that it was open to the Board and within its jurisdiction to reach the conclusion which it did.

Under the provisions of the present s. 77(*d*) (formerly s. 76) of the Act, the Board is given

> . . . exclusive jurisdiction to inquire into, hear and determine . . .
> (*d*) the degree of diminution of earning capacity by reason of any injury;

and s. 22(1) of the Act provides that when the Board is awarding compensation "regard shall be had to the workman's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business".

In my opinion, the Board has jurisdiction to review the appellant's claim in light of the specialist's certificate and to determine that no change should be made in the disposition of his case because of the degree of his fitness to adapt himself to employment at clerical work if he chose to do so. Whether or not this formed the basis of the Board's decision is not for me to say. In assessing the effect of the specialist's certificate on the appellant's right to compensation, it was, in my opinion, within the jurisdiction of the Board to examine all other data available to it for the purpose of determining whether or not the appellant's earning capacity had been diminished as a result of his disability and the fact that I am unable, on the material before us, to understand how the Board reached the decision which it did is quite beside the point.

As was said by Judson J. in *Farrell v. Workmen's Compensation Board*[1]:

> . . . even if there was error, whether in law or fact, it was made within the exercise of the jurisdiction and is not open to any judicial review including *certiorari*.

The case of *Battaglia v. Workmen's Compensation Board*[2] stands on entirely different ground, because in that case it was clear that the medical opinion embodied in the certificate of a specialist had been ignored by the Board which had reached its decision on the basis of a contrary opinion obtained from other doctors. In so doing, the Board disregarded the medical conclusions contained in the certificate and thus trespassed on a field over which the specialist had been given exclusive jurisdiction by s. 54A(5).

[1] [1962] S.C.R. 48 at 51, 31 D.L.R. (2d) 177.
[2] (1960), 32 W.W.R. 1, 24 D.L.R. (2d) 21.

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Ritchie J.

In view of all the above, I would dismiss this appeal. I would, however, make no order as to costs as I am of opinion that these proceedings might well have been avoided had the Board seen fit to inform the appellant of the reasons for its decision regarding the matters contained in Dr. Greenwood's certificate of February 1, 1957.

HALL J.:—I concur in the judgment of Ritchie J. I am impelled, however, to say, that this workman does not appear to have received the substantial justice which s. 79 of the *Workmen's Compensation Act* of British Columbia contemplates. Section 79 reads:

> 79. The decision of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent.

The courts are without power to review the merits of the case on *certiorari*. The legislature has given the Board unlimited discretion not subject to appeal or judicial review as long as the Board acts within its jurisdiction.

Appeal dismissed.

Solicitors for the appellant: Shulman, Tupper, Worrall & Berger, Vancouver.

Solicitors for the respondent: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.

BOGOCH SEED COMPANY LIMITED ..APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY AND CANADIAN NATIONAL RAILWAYS ..... RESPONDENTS.

1962
*Nov. 27, 28

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ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Statute—Interpretation—Rapeseed—Whether "grain" under Crow's Nest Pass Agreement and Crow's Nest Pass Act, 1897 (Can.), c. 5—Railway Act, R.S.C. 1952, c. 234, s. 328 as amended, 1960-61 (Can.), c. 54.

The Board of Transport Commissioners dismissed the appellant's application for an order declaring that rapeseed was a "grain" within the meaning of the Crow's Nest Pass Agreement, and for an order directing the establishment by the respondents and the Board of rates on rapeseed from prairie points eastbound to Fort William and westbound to the Pacific coast on the basis of the rates charged for the transportation of grain. The Crow's Nest Pass Agreement was made between the Crown and the Canadian Pacific Railway Company in 1897 pursuant to the *Crow's Nest Pass Act*, 1897 (Can.), c. 5, and provided for certain rate reductions on grain and flour. The rates so fixed were later extended in application by provisions added to the *Railway Act* in 1925, which now appear as subs. (6) and (7) of s. 328 of the present Act, R.S.C. 1952, c. 234.

The issue for determination was as to whether the word "grain", as it is used in the Crow's Nest Pass Agreement and in the *Crow's Nest Pass Act*, was to be construed as meaning only those commodities which, at the time the statute and the agreement came into existence, were, in the ordinary sense, considered as grain, or whether it should be held to include a commodity which, at a later date, had come to be regarded as a grain in the ordinary sense. The Board, by a majority, decided that the word "grain" in the *Crow's Nest Pass Act* and the Crow's Nest Pass Agreement, and in s. 328 (6) and (7) of the *Railway Act*, did not include rapeseed. Subsequent to this decision and to the order giving the appellant leave to appeal, an amendment to s. 328 of the *Railway Act*, effective August 1, 1961, was passed which provided that the expression "grain" included rapeseed. Therefore the instant decision had relation only to the situation which existed prior to that date.

Held: The appeal should be dismissed.

The principle of construction that was stated, with reference to the *British North America Act*, in *British Coal Corporation v. The King*, [1935] A.C. 500, *i.e.*, in interpreting a constituent or organic statute that construction most beneficial to the widest possible amplitude of its powers must be adopted, could not properly be applied to the statute in question in this case because its purpose was entirely different. The *Crow's Nest Pass Act* was enacted so as to provide for the making of an agreement. The agreement that followed was dealing with a reduction in the existing rates on grain and flour and it seemed that the parties

*PRESENT: Taschereau, Fauteux, Martland, Judson and Ritchie JJ.

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contemplated, and only contemplated, the effecting of a reduction in rates then applicable on what both parties, at that time, regarded as being grain. *The Governments of Alberta, Saskatchewan and Manitoba v. The C.P.R.*, [1925] S.C.R. 155, applied.

The words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute. *Sharpe v. Wakefield* (1889), 22 Q.B.D. 239, affirmed, [1891] A.C. 173; *Simpson v. Teignmouth and Shaldon Bridge Co.*, [1903] 1 K.B. 405; *Kingston Wharves Ltd. v. Reynolds Jamaica Mines Ltd.*, [1959] 2 W.L.R. 40; *Attorney-General for the Isle of Man v. Moore*, [1938] 3 All E.R. 263, referred to.

APPEAL from an order of the Board of Transport Commissioners[1], dismissing the appellant's application for certain orders. Appeal dismissed.

George H. Steer, Q.C., and *G. A. C. Steer*, for the appellant.

W. R. Jackett, Q.C., and *K. D. M. Spence, Q.C.*, for the respondent: Canadian Pacific Railway Company.

Gordon W. Ford, Q.C., and *E. B. MacDonald*, for the respondent: Canadian National Railways.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from an order of the Board of Transport Commissioners[1], which dismissed the appellant's application for an order declaring that rapeseed is a "grain" within the meaning of the Crow's Nest Pass Agreement, and for an order directing the establishment by the respondents and the Board of rates on rapeseed from Prairie points eastbound to Fort William and westbound to the Pacific coast, on the basis of export rates applicable to grain from Prairie points to Fort William and the Pacific coast as the case may be, and declaring the rates being charged at the time of the application to be and to have been beyond the jurisdiction of the respondents and of the Board, void and of no effect.

The issue of law, on which leave to appeal was given in this case, is stated in the order which gave to the appellant leave to appeal, and is as follows:

Whether the majority of the Board, consisting of Chief Commissioner Rod Kerr and Assistant Chief Commissioner H. H. Griffin, and Commissioner W. R. Irwin, whose reasons for judgment were delivered by the said Chief Commissioner erred, having found that rapeseed was now

[1] 81 C.R.T.C. 79.

recognized as a grain, in not holding that rapeseed must be included within the meaning of the word "grain" as used in the Crowsnest Pass Act, being Chapter 5 Statutes of Canada, 1897, and the Railway Act of Canada, Section 328 (6) and (7)?

Commissioner Knowles and Commissioner Woodard, who dissented, were of the opinion that rapeseed is now a "grain" within the meaning of the Crow's Nest Pass Agreement.

The Crow's Nest Pass Agreement was made on September 6, 1897, between Her Majesty The Queen, acting in respect of the Dominion of Canada, and the Canadian Pacific Railway Company (which is hereinafter referred to as "C.P.R."). It was made pursuant to a statute commonly known as the *Crow's Nest Pass Act*, 1897 (Can.), c. 5, which authorized a grant of subsidy to the C.P.R. toward the cost of construction of a railway through the Crow's Nest Pass on condition that the C.P.R. first enter into an agreement with the Government containing certain stipulated covenants by the C.P.R., which included the following:

(*a*) That the Company will construct or cause to be constructed, the said railway upon such route and according to such descriptions and specifications and within such time or times as are provided for in the said agreement, and, when completed, will operate the said railway for ever;

* * *

(*e*) That there shall be a reduction in the Company's present rates and tolls on grain and flour from all points on its main line, branches, or connections, west of Fort William to Fort William and Port Arthur and all points east, of three cents per one hundred pounds, to take effect in the following manner:— One and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-eight, and an additional one and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-nine; and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned on such merchandise from the points aforesaid.

The agreement, as executed, contained these covenants.

In the year 1924 the Board of Railway Commissioners had to consider the issue as to whether the rate reductions provided for in the agreement applied only to points which had been upon the railway's system in 1897, or whether they also applied to points to which the system had been extended subsequently. The Board ruled that the rates stipulated in the agreement were not binding upon the Board and, therefore, that it did not require to consider this issue.

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Martland J.

An appeal by leave of the Board was taken to this Court, which was argued in 1925 (*The Governments of Alberta, Saskatchewan and Manitoba v. The C.P.R.*[1]). It was decided on that appeal that the statute and the agreement were binding upon the Board, which had no power to change the rates thereby fixed, but that the rates so fixed applied only to the carriage of freight between the points which were on the C.P.R. system in 1897. Anglin C.J.C., at p. 171, said:

> We now pass to the consideration of the second question: Do the Crow's Nest Pass rates apply exclusively to the designated traffic between points which were on the Canadian Pacific Railway Company's lines in 1897? The terms in which the rate reduction clauses (*d*) and (*e*) were couched seem to afford a conclusive answer in the affirmative. Both clauses provide for a reduction in then existing rates and tolls—clause (*d*) by deducting certain specified percentages from rates and tolls in respect to the carriage of certain commodities as now charged or as contained in the present freight tariff of the company, whichever rates are the lowest; clause (*e*) by deducting from the present rates on eastbound grain and flour 3 cents per one hundred pounds. It is obvious that the rates and tolls to be reduced whether those actually charged, or those contained in the freight tariff, were rates and tolls between points actually on the Canadian Pacific Railway as then existing. There were—there could be—no rates or tolls in existence to or from points not then on the system; and there could be no reductions in non-existing rates and tolls.

Following that decision, Parliament promptly enacted c. 52, Statutes of Canada 1925, which added provisions to the *Railway Act* which now appear as subss. (5), (6) and (7) of s. 328 of the present Act, R.S.C. 1952, c. 234.

> (5) Notwithstanding the provisions of section 3 the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, are not limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company.
>
> (6) Notwithstanding anything in subsection (5), rates on grain and flour shall, on and from the 27th day of June, 1925, be governed by the provisions of the agreement made pursuant to chapter 5 of the statutes of Canada 1897, but such rates shall apply to all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

[1] [1925] S.C.R. 155, 2 D.L.R. 755, 30 C.R.C. 32.

(7) The Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities or of undue or unreasonable preference, respecting rates on grain and flour, governed by the provisions of chapter 5 of the statutes of Canada, 1897, and by the agreement made or entered into pursuant thereto within the territory referred to in subsection (6), on the ground that such discrimination or preference is justified or required by the said Act or by the agreement made or entered into pursuant thereto.

On August 26, 1927, by Order 448, the Board ordered that the rates on grain and flour from Prairie points to Vancouver and Prince Rupert for export (to which the 1925 statute had not applied the Crow's Nest Pass Agreement rates) be on the same basis as the rates to Port Arthur.

The application in the present case raised the issue as to whether or not rapeseed was a "grain" within the meaning of the Crow's Nest Pass Agreement and the *Crow's Nest Pass Act*. The application was heard on March 8 and 9, 1960. Subsequent to the decision of the Board and to the order giving to the appellant leave to appeal therefrom to this Court, there was enacted, on July 13, 1961, and taking effect on August 1, 1961, an amendment to s. 328 of the *Railway Act*, adding thereto subs. (8) as follows:

(8) For the purposes of subsections (6) and (7) and the Act and agreement therein referred to, the expression "grain" includes rapeseed, and the rates applicable to the movement of rapeseed from any point referred to in subsection (6) after the coming into force of this subsection shall not exceed the rates applicable to flaxseed.

As from August 1, 1961, therefore, the issue before this Court has been settled by the statute and the decision of the Court in this case can only have relation to the situation which existed prior to that date.

The evidence before the Board showed that the rape plant is a broad-leafed plant of the same genus as cabbage, brussels sprouts and turnips. There is an annual variety and a biennial type. The latter was grown in Canada as a forage crop as far back as the 1890's, but, as it could not survive the winter in most parts of Canada, it produced only forage and not seeds. The seed for it was imported into Canada.

The annual variety, which produces oil seed rapes, was not produced commercially in Canada until 1943, when it was first grown to provide a source of oil for certain naval requirements. It produces an edible oil, useful for margarine and other foods, and has continued to be produced commercially in Canada since 1943.

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Martland J.

The evidence indicated that this type of plant, for the purpose of providing seeds for the production of oils, had been grown in Europe for a hundred years or more. There was, however, no evidence as to whether it had been considered, in the countries in which it was produced, as being a grain crop.

There was evidence, which the Board accepted, that rapeseed would not have been generally regarded in Canada in 1897 as a grain. "Grain" is a term of general usage applied to certain agricultural commodities by the trade. In 1943, when rapeseed came to be grown commercially, with the seed sold as a commercial product for purposes other than the growing of new plants, it did become recognized by the trade as a grain. The Board made the following finding upon the evidence:

> I find that the word "grain", as used and understood today by farmers, agronomists, transportation people and what is generally called the "grain trade" in Canada, in respect of such undisputed grain as wheat, oats and barley also includes rapeseed, that rapeseed to them is grain in the same sense that wheat, oats and barley are grain, and that they include rapeseed in their common usage of the word grain—and that it was so included, used and understood by them since 1943, but not prior thereto.

Evidence was given regarding the tariffs immediately prior to and subsequent to the making of the Crow's Nest Pass Agreement. This evidence is summarized in the reasons of the Chief Commissioner as follows:

> When the Crow's Nest Pass Act was passed, Canadian Pacific's present rates and tolls on grain and flour were contained in its Tariff No. 236 which came into effect on September 5, 1893, and was in effect through 1897. The title page of that tariff had the following words:
>
> "Special Tariff
> on
> Grain, Flour, Oatmeal, Millstuffs
> Flaxseed, Oilcake, Potatoes and Hay,
> in Carloads,
> From Stations on the above Railways in Manitoba,
> Assiniboia, Saskatchewan and Alberta,
> Keewatin, Rat Portage,
> West Fort William, Fort William
> and
> Port Arthur."
>
> There was no specific reference to rapeseed in that tariff. To find the rate for rapeseed it would be necessary to go to "Canadian Joint Freight Classification No. 10(a)", which took effect on September 1, 1897, and use it in conjunction with C. P. Tariff No. 270, which provided for mileage

class rates effective on October 1, 1894. There was no specific reference to rapeseed in Classification No. 10(*a*) and one would have to use the item "Seed, Field, not otherwise specified". The classification contained the item "Grain" and under it are specified only "Barley, Beans, Buckwheat, Corn, Malt, Oats, Peas, Rye, Wheat", and the statement "The general term 'Grain' will not apply on Pot and Pearl Barley, Beans, Buckwheat or Split Peas on special 'grain' Tariffs, unless these articles are enumerated thereon as included in the Special Grain Rates." The carload ratings in the classification on seed, including rapeseed, were fifth class, and the fifth class rates to Fort William were considerably higher than the rates on grain to Fort William in Tariff No. 236 above referred to.

The first reduction on grain and flour made by Canadian Pacific under the Crow's Nest Pass Agreement was by its Tariff No. 494, effective August 1, 1898, and its title page was similar to the title page of Tariff 236 above described.

The second reduction under the Agreement was made by C.P. Tariff No. 543, effective September 1, 1899, and it was entitled as follows:

"Special Tariff
on
Grain, Flour, Oatmeal, Mill Stuffs."

and did not include flax, oilcakes, potatoes and hay which were put in another tariff without the second reduction in rates.

Rapeseed was first listed specifically when it appeared in Supplement No. 1 to Canadian Freight Classification No. 15, effective August 15, 1911, where it appeared under the item "Seeds" as "Rape, in barrels . . .", taking fifth class carload rating.

In 1925, the position was that rapeseed was listed in Canadian Freight Classification No. 16, under the item "Seed" among such other seeds as clover, mustard, timothy, sugar beet, etc., with fifth class carload rating.

Supplement No. 39 to C.P.'s Tariff No. W-4933, C.R.C. W-2641, effective June 18, 1925, and Supplement No. 36 to C.N.'s Tariff W-1-183-B, C.R.C. W-251, effective June 18, 1925, each of them on grain and grain products, were in effect when the 1925 amendment to the Railway Act was passed. Neither the supplements nor the original tariffs which they supplemented provided rates on rapeseed.

In 1927, pursuant to Board's General Order No. 448, rates were published on the Crow's Nest Pass basis on grain and grain products but they did not apply on rapeseed, the rates on rapeseed being the fifth class rates as provided in the Canadian Freight Classification under the heading "Seed".

Rapeseed has never taken the Crow's Nest Pass rates on grain, instead it has taken substantially higher rates.

The legal issue which has to be determined is as to whether the word "grain", as it is used in the Crow's Nest Pass Agreement and in the *Crow's Nest Pass Act,* is to be construed as meaning only those commodities which, as at the time the statute and the agreement came into existence, were, in the ordinary sense, considered as grain, or whether

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it should be held to include a commodity which, at a later date, has come to be regarded as a grain in the ordinary sense.

The appellant, in supporting the latter view, relies upon s. 10 of the *Interpretation Act*:

> 10. The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning.

Reliance was placed upon the decision of the Privy Council in *Attorney-General for Alberta v. Attorney-General for Canada*[1], in which there was considered the meaning of the word "banking" in s. 91 of the *British North America Act* and the question as to whether that term was confined to the activities of banks as conducted in 1867. Viscount Simon, at p. 516, said:

> The question is not what was the extent and kind of business carried on by banks in Canada in 1867 but what is the meaning of the term itself in the Act.

There was also cited the decision of the Court of Appeal of Ontario in *Re McIntyre Porcupine Mines Limited and Morgan*[2], in which the Court had to consider the meaning of the word "concentrators" for the purposes of the *Assessment Act*. In that case Hodgins J.A., at p. 219, said:

> The rule laid down in the Interpretation Act, R.S.O. 1914, ch. 1, sec. 10, is that statutes shall "receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof." It is therefore open to the Court to adopt the larger or later meaning of the word in question, if it be true, as I think it is, that the Assessment Act in this particular aims at exempting such means as may be adopted in the mining location to aid in the concentration of the ore-mass, even if that progresses to the point of using chemical means as well as those mechanical, and in so doing draws within its scope some part of what may be alternatively described as amalgamation or reduction:

Section 10 of the *Interpretation Act* refers to the "spirit, true intent and meaning" of an Act and, in construing the meaning of the *Assessment Act*, Hodgins J.A., in the passage just quoted, gave effect to the purpose which he found for the section in question in the *Assessment Act*.

In *The Attorney-General for Alberta v. The Attorney-General for Canada* the Court was considering the meaning of a term in the *British North America Act*, which the

[1] [1947] A.C. 503. [2] (1921), 49 O.L.R. 214.

learned Chief Commissioner, in his reasons, has described as "an organic statute conferring legislative powers". In his reasons the Chief Commissioner went on to refer to *British Coal Corporation v. The King*[1], in which, at p. 518, Viscount Sankey said:

> Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted.

I do not think that the same principle of construction can properly be applied to the statute in question in the present case because its purpose was entirely different. The *Crow's Nest Pass Act* was enacted so as to provide for the making of an agreement. It is true that the rates established by that agreement had statutory effect, as was pointed out by this Court in 1925 in the case of *The Governments of Alberta, Saskatchewan and Manitoba v. The C.P.R.*, previously mentioned. But, none the less, it was an agreement which was being made in 1897 between two parties, the Crown and the C.P.R., and under its terms, in consideration of a grant from the Crown to the C.P.R., the latter agreed to reduce its rates on certain commodities. That was the essence of the agreement, which provided that "there shall be a reduction in the Company's *present rates and tolls* on grain and flour". It then went on, after providing how and when such reductions should be effected, to provide: "and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned." In other words, the reduction in rates was not temporary in nature, but would continue. The agreement was dealing with a reduction in the existing rates on grain and flour and it seems to me that the parties contemplated, and only contemplated, the effecting of a reduction in rates then applicable on what both parties, at that time, regarded as being grain.

I am reinforced in this opinion by the reasons of Anglin C.J.C., already cited, in the case of *The Governments of Alberta, Saskatchewan and Manitoba v. The C.P.R.* The reasoning which he applied, in deciding that the agreement related only to points existing on the C.P.R. lines as at the date of the agreement, applies, by analogy, in considering what was meant by the word "grain", and, just as the agreement did not cover points subsequently added to the system, so it did not cover commodities which were not considered

[1] [1935] A.C. 500.

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as grain at the time of the making of the agreement, even though they subsequently came to be considered as grain in the trade.

In my opinion, the rule which is applicable in this case is that which was stated by Lord Esher in his judgment in *Sharpe v. Wakefield*[1]:

> Now what is the rule of construction to be applied? It is that the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute.

The judgment of the Court of Appeal in that case was affirmed by the House of Lords[2].

In *Simpson v. Teignmouth and Shaldon Bridge Company*[3], the issue was as to whether a bicycle was a "carriage" within the meaning of a statute of George IV which imposed certain bridge tolls. The Earl of Halsbury L.C. said at p. 413:

> The broad principle of construction put shortly must be this: What would, in an ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed?

This passage was cited in the Privy Council decision in *Kingston Wharves Ltd. v. Reynolds Jamaica Mines Ltd.*[4] The same principle was applied by the Privy Council in *Attorney-General for the Isle of Man v. Moore*[5].

Applying that rule in the present case, it is my opinion that the Board, having found that the word "grain" did not include rapeseed prior to 1943, properly decided that the word "grain" in the *Crow's Nest Pass Act* and the Crow's Nest Pass Agreement, and in s. 328(6) and (7) of the *Railway Act,* did not include rapeseed.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

Solicitor for the respondent, Canadian Pacific Railway Co.: K. D. M. Spence, Montreal.

Solicitor for the respondent, Canadian National Railways: W. G. Boyd, Montreal.

[1] (1889), 22 Q.B.D. 239 at 242.
[2] [1891] A.C. 173.
[3] [1903] 1 K.B. 405.
[4] [1959] 2 W.L.R. 40.
[5] [1938] 3 All E.R. 263.

THE CROW'S NEST PASS COAL COMPANY (LIMITED) ..... APPELLANT;

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*Jan. 29, 30
**April 1

AND

ALBERTA NATURAL GAS COMPANY ..RESPONDENT.

ON APPEAL FROM A DECISION OF THE NATIONAL ENERGY BOARD

Real property—Pipe line right of way—Compensation for mines and minerals—Jurisdiction of National Energy Board—National Energy Board Act, 1959 (Can.), c. 46—Railway Act, R.S.C. 1952, c. 234.

The respondent was granted a certificate of public convenience and necessity to construct a pipe line through certain lands owned by the appellant, whose ownership thereof included the mines and minerals, including coal, lying under the said lands. After unsuccessful negotiations between the parties a notice of expropriation, with a form of easement attached thereto, was served by the respondent on the appellant. Upon the matter being heard before the County Court judge, a warrant for immediate possession of the main line right of way was granted to the respondent, who then took possession and constructed the pipe line. At the compensation proceedings the appellant took the position that while the National Energy Board under s. 72 of the *National Energy Board Act* had jurisdiction to award compensation for mines and minerals lying within the respondent's right of way and for a distance of forty yards on either side of the limits of the right of way, the awarding of compensation for mines and minerals lying beyond the forty-yard limits was not within the competence of the Board but could be awarded only by the County Court judge in his capacity as arbitrator. The matter having been brought before the Board for determination, the latter found that under the *National Energy Board Act* it had sole jurisdiction to award compensation for mines and minerals, whether within or without the protected area. The appellant appealed to this Court.

Held: The appeal should be allowed.

The jurisdiction over mines and minerals vested in the National Energy Board pursuant to the *National Energy Board Act,* 1959 (Can.), c. 46, including its jurisdiction to award compensation to an owner, lessee or occupier of any mines or minerals, is restricted to those mines and minerals only, lying under a pipe line or any of the works connected therewith, or within forty yards therefrom. Any right which the owner of the right of way may have to prevent mining outside the protected area, arises and must be enforced under the general law.

APPEAL from a decision of the National Energy Board, granting certain declaratory orders sought by the respondent. Appeal allowed.

J. J. Robinette, Q.C., and *A. B. Ferris,* for the appellant.

John L. Farris, Q.C., and *J. M. Giles,* for the respondent.

*PRESENT: Kerwin C.J. and Abbott, Martland, Ritchie and Hall JJ.
**Kerwin C.J. died before the delivery of judgment.

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THE CROW'S NEST PASS COAL CO. (LTD.) v. ALBERTA NATURAL GAS CO.

The judgment of Abbott, Ritchie and Hall JJ. was delivered by

ABBOTT J.:—This is an appeal pursuant to s. 18(1) of the *National Energy Board Act*, 1959 (Can.), c. 46, from a decision of the National Energy Board made on June 13, 1962, granting two declaratory orders sought by the respondent Alberta Natural Gas Company.

These two orders declared:

(a) That the National Energy Board Act gives the National Energy Board sole jurisdiction to determine the compensation payable in respect of any mines and minerals affected by a pipeline.

(b) that such compensation may only be awarded from time to time if the Board is satisfied the mine owner has a bona fide intention to commence mining operations which will be affected by the presence of a pipeline.

The main questions before the Board were (1) whether ss. 68 to 72 inclusive of the *Energy Board Act* gave to the Board sole jurisdiction to determine the compensation payable in respect of any mines and minerals adversely affected by the construction and operation of a pipe line no matter where such mines and minerals may be located, or (2) whether, as the appellant contended, the Board's jurisdiction is limited to awarding compensation, if any, for those mines and minerals lying under a pipe line and any works connected therewith or within forty yards therefrom.

The events which led up to the parties bringing the matter before the Board for determination, are admirably summarized in the Board's decision as follows:

The Applicant (the present respondent) having been granted a certificate of public convenience and necessity No. GC-12 to construct a pipe line, proceeded with the work. The Respondent (the present appellant) owns certain lands and the mines and minerals, including coal thereunder, if any, through which the Applicant's main line right-of-way passes. These lands, mines and minerals are situate in the Kootenay District of the Province of British Columbia. Columbia Iron Mining Company has options to purchase these mines and minerals, including the coal. After unsuccessful negotiations between the parties whereby the Applicant sought to obtain a grant of easement from the Respondent for the construction of the pipe line and other facilities, a notice of expropriation dated January 19, 1961, with a form of easement thereto attached, was served by the Applicant upon the Respondent. Upon the matter being heard before the County Court Judge of the County of East Kootenay, a warrant for immediate possession of the main line right-of-way was granted to the Applicant. The Applicant posted security in the sum of $100,000, took possession of the main line right-of-way and thereupon commenced construction of its pipe line, which was later completed.

Subsequently the Applicant applied to the said Judge as Arbitrator to determine the compensation payable to both the Respondent and Columbia Iron Mining Company by reason of the taking of the right-of-way. The

necessary hearing to set compensation commenced July 6, 1961, and has since, by consent of the parties, been adjourned from time to time.

At the compensation proceedings, prior to the last adjournment thereof, the Respondent took the position that, while the National Energy Board under Section 72 of the National Energy Board Act had jurisdiction to award compensation for mines and minerals lying within the Applicant's right-of-way and for a distance of forty yards on either side of the limits of the right-of-way, the awarding of compensation for mines and minerals lying beyond the forty-yard limits (hereinafter referred to as "outside minerals") was not within the competence of the National Energy Board but could be awarded only by the County Court Judge in his capacity as Arbitrator. The Applicant, Alberta Natural Gas Company, of course argued that the National Energy Board has jurisdiction under Section 72 of its Act to award compensation for mines and minerals both inside and outside the aforementioned forty-yard limits. The parties have agreed, without prejudice to the right, if any, of the Respondent and Columbia Iron Mining Company to continue the arbitration proceedings before the County Court Judge for the County of East Kootenay with respect to their claims for compensation for mines and minerals (including coal and the severance thereof) lying outside the right-of-way and more than forty yards therefrom, and without prejudice to the right, if any, of the Applicant to maintain and assert in any such proceedings that the said County Court Judge does not have jurisdiction to award such compensation, upon a form of easement which has been granted by the Respondent and Columbia Iron Mining Company to the Applicant and registered in the Land Registry Office at the City of Nelson, British Columbia. This easement grants Alberta Natural Gas Company a right-of-way upon and through which it may construct its pipe line and other facilities. By reason of the grant of the easement, the Respondent and Columbia Iron Mining Company are obliged not to withdraw support of the surface of the right-of-way. The easement does not make provision for payment to the Respondent or to Columbia Iron Mining Company of any compensation for mines or minerals (including coal or the severance thereof). The Compensation claims of the Respondent and of Columbia Iron Mining Company for mines and minerals (including coal and the severance thereof) are preserved to them as hereinbefore provided to be presented before or dealt with by such Board, Court or Arbitrator as may be found to have jurisdiction with respect thereto. Provision has, however, been made in the easement for the payment of compensation for minerals (including coal) that are necessary to be dug up, carried away or used on the right-of-way during the course of the construction or reconstruction of the pipe line and other facilities of the Applicant.

The Board found that under s. 72 of the *National Energy Board Act* it had sole jurisdiction to award compensation for mines and minerals whether within or without the protected area prescribed by s. 70 of the said Act, and on August 17, 1962, it made the declaratory orders above referred to.

The present appeal by leave is from that decision.

The *National Energy Board Act* is the successor to and repealed the *Pipe Lines Act*, R.S.C. 1952, c. 211. These two acts were the first federal statutes dealing with the regulation of pipe lines in Canada. Under the *Pipe Lines Act*

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regulatory duties were vested in the Board of Transport Commissioners for Canada. Under the *Energy Board Act* these duties were transferred to a new body, the National Energy Board.

Power to expropriate is granted under the *Energy Board Act* and s. 64 of that Act (which is identical to s. 166 of the *Railway Act*, R.S.C. 1952, c. 234) provides that a company exercising its powers under the act shall make full compensation to all persons interested for all damages sustained by them by reason of the exercise of such powers. The expropriation provisions of the *Railway Act*—ss. 218 to 246 inclusive—are incorporated by reference into the *Energy Board Act*. Generally speaking, these sections provide for such matters as the fixing of compensation, the appointment of an arbitrator, proceedings before the arbitrator and the like. It is common ground that the said sections govern the fixing of compensation payable for the surface rights of way for a pipe line.

The *Pipe Lines Act* and the *Energy Board Act* each contain five sections under the sub-heading "Mines and Minerals" which are in substantially the same terms. In the *Energy Board Act* these are ss. 68 to 72 inclusive. They were based upon five similar sections under the same sub-heading—ss. 197 to 201 inclusive—in the *Railway Act*. These sections in turn had their origin in an Imperial statute, the *Railway Clauses Consolidation Act, 1845*, c. 20. The effect of what are now ss. 197 and following of the *Railway Act* was considered by the Judicial Committee in *Davies v. James Bay Railway Company*[1], and after that decision was rendered Parliament amended the *Railway Act* by adding what are now ss. 200 and 201 of the said act.

With certain minor differences—which in my view have no relevance to the question at issue in this appeal—ss. 68 to 71 of the *Energy Board Act* are in the same terms as ss. 197 to 199 and s. 201 of the *Railway Act*. Section 72 of the *Energy Board Act* is in slightly different terms to the corresponding s. 200 in the *Railway Act*, and it is upon this difference that respondent mainly relies.

Both s. 70 of the *Energy Board Act* and the corresponding s. 199 of the *Railway Act*, provide that no person shall work mines or minerals lying under a pipe line or railway or

[1] [1914] A.C. 1043.

any of the works connected therewith or within forty yards therefrom until leave therefor has been obtained from the Energy Board or the Board of Transport Commissioners as the case may be. This area—some three hundred feet wide—was appropriately described by Mr. Robinette in his argument as "the protected area".

As Locke J. pointed out in *Attorney General of Canada v. C.P.R.* and *C.N.R.*[1], the effect of ss. 197 to 201 of the *Railway Act* is to ensure that when a railway is carried over lands which contain mines or minerals the interests of (1) the owner of such minerals (2) the public and (3) the railway company, are adequately protected. In my opinion ss. 68 to 72 inclusive of the *Energy Act* have precisely the same purpose and effect.

In my view it is also clear, that neither the Board of Transport Commissioners nor the Energy Board has been given any jurisdiction to interfere with mining operations outside the protected area. Any right which the owner of the right of way may have to prevent mining outside the protected area, arises and must be enforced under the general law.

It is common ground that in the case of a railway right of way, jurisdiction to fix the compensation, if any, for minerals lying under the right of way, is vested by s. 200 of the *Railway Act* in the Board of Transport Commissioners, but that compensation for minerals outside the protected area, which must be left in place to afford support to the surface of the right of way, is to be determined by an arbitrator in accordance with ss. 222 and following, in the same way as compensation for the surface right of way.

Respondent's contention is that by virtue of s. 72 of the *Energy Board Act,* the Energy Board has sole jurisdiction to determine the compensation payable in respect of any mines and minerals affected by a pipe line. That contention is based upon what respondent submits is the plain and literal meaning of the said section which reads:

> 72. A company shall, from time to time, pay to the owner, lessee or occupier of any mines such compensation as the Board shall fix and order to be paid for or by reason of any severance by a pipe line of the land lying over such mines, or because of the working of the mines being prevented, stopped or interrupted, or because of the mines having to be worked in such manner and under such restrictions as not to injure or be

[1] [1958] S.C.R. 285 at 304, 12 D.L.R. (2d) 625.

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detrimental to the pipe line, and also for any minerals not purchased by the company that cannot be obtained by reason of the construction and operation of its line.

The corresponding s. 200 in the *Railway Act* reads:

200. *The* company shall, from time to time, pay to the owner, lessee, or occupier of any *such* mines such compensation as the Board shall fix and order to be paid, for or by reason of any severance by the *railway* of the land lying over such mines, or because of the working of *such* mines being prevented, stopped or interrupted, or of *the same* having to be worked in such manner and under such restrictions as not to injure or be detrimental to the railway, and also for any minerals not purchased by the company that cannot be obtained by reason of the construction and operation of *the railway*.

The italics are mine.

It will be seen that the only differences between the two sections are the substitution of the word "a" for the word "the" in the first line [in s. 200 as in R.S.C. 1952], the elimination of the word "such" between the words "any" and "mines" in the second line, the substitution of the words "pipe line" for "railway" in the fourth line, the substitution of the word "the" for the word "such" in the sixth line, the substitution of the words "the mines" for the words "the same" in the seventh line, and the substitution of the words "its line" for the words "the railway" in the last line.

Section 72 must be read in the context in which it is found. It forms part of a group of five sections which provide for the control of mining operations under and within a prescribed distance from a pipe line. No power is given to control mining operations outside that protected area. The purpose of these five sections (and of the corresponding sections in the *Railway Act*) is to ensure that the interests of the public, the pipe line company and the mine owner are protected.

I agree with Mr. Robinette's submission that the differences between s. 72 of the *Energy Board Act* and s. 200 of the *Railway Act* are merely drafting changes and do not justify any inference that Parliament intended in the case of a pipe line, to alter the law with respect to the fixing of compensation for minerals lying outside the protected area. That law is to be found in ss. 218 and following of the *Railway Act* which have been incorporated by reference into the *National Energy Board Act*.

Under the *Railway Act* if the removal of minerals lying under a railway is proposed, the owner must apply to the Transport Board for leave to do so and that Board under

the powers given to it by s. 199 may prescribe the measures to be taken for the protection of the public. The same powers are given to the Energy Board under s. 70 of the *Energy Board Act*. Section 200 gives the Transport Board power to direct a railway company to pay to such owner compensation by reason of the severance by the railway of the lands lying over the mines because working them is prevented or interrupted. It is conceded that the Transport Board's jurisdiction to award such compensation is limited to compensation for minerals lying within the protected area.

Similar powers are given to the Energy Board under s. 72 of the *Energy Board Act* and, in my opinion, the jurisdiction of the Energy Board under s. 72 to award compensation, is subject to the same limitation as that imposed upon the Transport Board under the s. 200 of the *Railway Act*.

I would allow the appeal with costs and declare that the jurisdiction over mines and minerals vested in the National Energy Board pursuant to the *National Energy Board Act*, 1959 (Can.), c. 46, including its jurisdiction to award compensation to an owner, lessee or occupier of any mines or minerals, is restricted to those mines and minerals only, lying under a pipe line or any of the works connected therewith, or within forty yards therefrom.

MARTLAND J.:—I am in agreement with the reasons delivered by my brother Abbott and merely wish to add the following additional comments.

Section 72 of the *National Energy Board Act*, which is cited in his judgment, relates only to compensation by a pipe line company to the owner, lessee or occupier of any *mines*. He is to receive compensation from the pipe line company, fixed by the National Energy Board,

(*a*) for severance of his land lying over the mines;

(*b*) because the working of his mines is prevented, stopped or obstructed;

(*c*) because his mines have to be worked in such manner and under such restrictions as not to injure or be detrimental to the pipe line;

(*d*) for minerals not purchased by the pipe line company that he cannot obtain by reason of the construction and operation of the pipe line.

The severance of lands above the mines referred to in (*a*) occurs by reason of the acquisition of its right of way by the pipe line company.

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The matters referred to in paras. (*b*) and (*c*) obviously relate to the limitations imposed on his right to work his mines created by s. 70 of the Act, the relevant portions of which provide:

> 70. (1) No person shall work or prospect for mines or minerals lying under a pipe line or any of the works connected therewith, or within forty yards therefrom, until leave therefor has been obtained from the Board.
>
> * * *
>
> (3) Upon an application to the Board for leave to work or prospect for mines or minerals, the applicant shall submit a plan and profile of the portion of the pipe line to be affected thereby, giving all reasonable and necessary information and details as to the proposed operations.
>
> (4) The Board may grant the application upon such terms and conditions for the protection and safety of the public as to the Board seem expedient, and may order that such things be done as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from the proposed operations.

In my opinion the minerals mentioned in para. (*d*) to which s. 72 refers, which the mine owner cannot obtain by reason of the construction and operation of the pipe line, are only those minerals which, because of the restrictions imposed by the Board under s. 70, he cannot obtain.

Any minerals lying beyond the protected area provided for in s. 70(1) are not prevented from being obtained by reason of the construction and operation of the pipe line. If they are prevented from being obtained at all, it is only because their owner is compelled to provide that support to which the pipe line owner becomes entitled at common law as an incident of his ownership of the pipe line right of way. The obligation to support resting upon the owner of the lands adjoining the pipe line right of way arises as soon as the pipe line company acquires its right of way, and not because of the construction and operation of its line. The restrictions on the obtaining of minerals, which arise by reason of the construction and operation of the line, are only those which are imposed under s. 70.

The words "not purchased by the company" are also of some significance. Obviously, if the pipe line company has purchased minerals, then the mine owner would not be in a position to claim compensation because he was unable to obtain them. In my opinion, these words must be related back to s. 69, which reads:

> 69. A company is not entitled to mines, ores, metals, coal, slate, oil, gas or other minerals in or under lands purchased by it, or taken by it under compulsory powers given to it by this Act, except only the parts

thereof that are necessary to be dug, carried away or used in the construction of the works, and except as provided in this section, all such mines and minerals shall be deemed to be excepted from the conveyance of such lands.

I think that the reason the words appear in s. 72 is that they had appeared in the equivalent section of the *Railway Act*, s. 200. They were included in that section because in s. 198(1) of the *Railway Act*, which is the equivalent of s. 69 of the *National Energy Board Act*, but different in its terms, the wording was as follows:

> The company is not, *unless the same have been expressly purchased*, entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, . . .

When s. 200 of the *Railway Act* referred to "minerals not purchased by the company that cannot be obtained by reason of the construction and operation of the railway", it meant minerals underlying the railway which the railway company had not expressly purchased and also those underlying the forty-yard strip on each side of the railway right of way.

The reference in s. 72 of the *National Energy Board Act* was, I think, incorporated directly from the *Railway Act*, even though s. 69 of the *National Energy Board Act* makes no reference to an express purchase of minerals. The significance of these words is, however, to direct attention to those minerals which underlie the pipe line right of way itself. Their inclusion in s. 72 tends to emphasize that when that section speaks of "any minerals not purchased by the company that cannot be obtained by reason of the construction and operation of its line" it is not referring to minerals in general, but is doing no more than to refer to those minerals which underlie the pipe line right of way and those which adjoin the pipe line right of way underlying the forty-yard strip on each side of it which the mine owner is precluded from working, without the leave of the Board, by virtue of s. 70.

I agree with the disposition of this appeal proposed by my brother Abbott.

Appeal allowed with costs.

Solicitors for the appellant: Messrs. Davis & Company, Vancouver.

Solicitors for the respondent: Messrs. Farris & Company, Vancouver.

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*Jan. 24, 25
**Feb. 11

RAYMOND D. WORKMAN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

WILLIAM HUCULAK .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Capital murder—Body of alleged victim never found—Circumstantial evidence—Theory that one of two accused merely an accessory after fact to murder committed by other—Whether sufficient reality to theory to require trial judge to place it before jury.

The two appellants, W and H, were convicted as principals, on a charge of capital murder. The victim's body was never found. The Crown's case relied exclusively on circumstantial evidence, and was based largely on the testimony of one O who testified as to events on the night of the alleged murder as well as to events before and after. A strong motive for murder was proved against W who devised the plan for the killing, but there was no evidence of motive against H who heard the plan on the day the deed was done. The common defence of both accused was that the death had not been satisfactorily proved, and that the Crown's case failed to meet the requirements for a conviction. In the Court of Appeal it was contended, for the first time, that the jury could have found that H was concerned not as a principal but as an accessory after the fact and that the trial judge erred in not putting this defence to the jury. The conviction was affirmed by the Court of Appeal. The accused appealed to this Court where the same submission on behalf of H was repeated.

Held: The appeal of W should be dismissed.

Held further (Ritchie and Hall JJ. dissenting): The appeal of H should be dismissed.

Per Fauteux, Abbott, Martland and Judson JJ.: The jury was correctly instructed that the case put against the accused was that they were both involved as principals, also as to the defence of both accused and as to the credibility of O's testimony. There was ample evidence upon which a jury could find beyond a reasonable doubt that the victim was dead, even though his body had not been found, and that the two accused were guilty as principals in his killing.

With respect to the submission of H, there was no possible ground for any instructions that, on any view of the evidence, H could be an accessory after the fact and not a principal. There could not be found in the

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*PRESENT: Kerwin C.J. and Fauteux, Abbott, Martland, Judson and Ritchie and Hall JJ.

**Kerwin C.J. died before the delivery of the judgment.

record any evidence which would convey a sense of reality in the submission. Failure of counsel to raise the matter does not relieve the trial judge of his duty to place a possible defence before the jury but there must be something beyond fantasy to suggest the existence of the duty.

Per Ritchie and Hall JJ., dissenting as to H's appeal: A trial judge, when addressing a jury in a criminal case, is not under a duty to explore all the remotest and most fantastic possibilities. Even though the alternative defence of H that he was an accessory after the fact rather than a principal relied on improbable suppositions, and even though it was extremely unlikely in the present case that the jury would have found in favour of such a defence, under all the circumstances such a direction should have been given. It could not be said to be impossible that the jury would have found H to be an accessory. The failure of the trial judge to place that defence before the jury entitled H to a new trial even though it was not raised at his original trial.

As to the case of W, the evidence against him was overwhelming.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming the convictions of the accused for capital murder. Appeal dismissed, Ritchie and Hall JJ. dissenting as to H's appeal.

T. J. Nugent, for the appellant Huculak.

F. S. Lieber, for the appellant Workman.

J. W. K. Shortreed, Q.C., for the respondent.

The judgment of Fauteux, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—The two appellants were convicted on a charge of the capital murder of one Frank Willey. Their appeal was dismissed by the Appellate Division of the Supreme Court of Alberta[1]. They appeal to this Court under s. 597(*a*) of the *Criminal Code*. The two accused were separately represented on both appeals. Neither gave evidence at the trial nor did they call any witnesses.

The learned trial judge instructed the jury that the case put against the accused was that they were both involved as principals in the offence charged and, in my respectful opinion, it was not open to objection on that basis, and, in fact, no objection was made by either counsel for the accused. The defence of both accused, also correctly and adequately put to the jury by the judge, was that the death of Frank Willey had not been satisfactorily proved, his body

[1] [1963] 1 C.C.C. 297.

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not having been found, and that the Crown's case, being based largely on circumstantial evidence, failed to meet the requirements for a conviction.

For the first time in the Court of Appeal counsel for Huculak submitted that on one view of the evidence, the jury could have found that his client was concerned not as a principal but as an accessory after the fact and that the learned trial judge erred in not putting this defence to the jury. The same submission was repeated in this Court and this makes it necessary for me to review the evidence.

Frank Willey was a golf professional in the City of Edmonton. At the time of his disappearance he was living in the same house as his wife and two children although there was strong evidence of an adulterous association between Workman and Mrs. Willey. Fourteen months before the disappearance of Willey, Workman had enquired of an Alberta solicitor whether it was possible for a guilty party in an adulterous association to get a substantial part of the property of the opposite party. When he was told that this was a very improbable result, he said to the solicitor "we'll just have to kill him." This was in February 1961. In July 1961, Mrs. Willey sued her husband for a judicial separation and claimed maintenance in the sum of $800 per month. Willey defended the action and also counterclaimed against Workman for damages for enticement and harbouring. This action was settled in January 1962.

Huculak did not come to Edmonton until February 1962. There is no evidence that he had ever known or even met Mrs. Willey or her husband or that he knew his co-accused Workman before he came to Edmonton or that he had any motive for joining in the killing of Willey.

One Paul Osborne, a neighbour of Huculak and one who had known him in Eastern Canada, gave evidence that on April 18, he met Workman and Huculak and had a conversation with them in a car, and that Workman suggested that he would like somebody "worked over." The three met again the following morning and, according to Osborne, Workman was still talking about "working this guy over." He eventually said that he wanted him killed and wanted it to look like an accident. "Knock this guy out, take him out in the country and hit him with another car." No name was mentioned and Osborne said that he immediately refused to have anything to do with the plan. Part of the plan was

to lure the victim to a partially built house somewhere. Workman telephoned Osborne at one o'clock in the afternoon of the same day, April 19, to find out whether his decision was final.

On the same day, Willey received a telephone call for the delivery of a set of ladies golf clubs, not to exceed $225 in value, as a present for the caller's wife. He accepted the order, procured the golf clubs and agreed to deliver them at 9 o'clock that night. There is evidence that on the afternoon of April 19, Workman was at the house where the killing is alleged to have been done and spoke to the painters. The purpose of his enquiry seems to have been to find out how late they would be working. Huculak was not with him. The house was under construction by a builder who employed Workman as a book-keeper.

On this date, April 19, Willey arrived home for dinner with the golf clubs and an extra bag in his car. He had dinner with his wife and family and with his sister and mother, who were visiting from Vancouver. After dinner he left with the car to deliver the golf clubs. A neighbour gave evidence of the presence of two cars and two men at a certain house. The two cars were identified as being white in colour. Willey owned an Oldsmobile which had a white body and brown top, and Workman had hired a white Pontiac a few days before April 19. It was in this house, which was the one which Workman had visited during the afternoon, that the police found a lot of blood, even after cleaning-up operations.

Between 9 and 10 on the same evening, April 19, Workman brought a tire to a service station. This tire came from Willey's car. At about 3 a.m. the following morning, he came back to this service station and picked up the wrong tire and rim. Instead of picking up the one from the Oldsmobile that he had left, he picked up one from a Cadillac belonging to another customer. This tire and rim were later found on Willey's car. There is a clear inference from this evidence that Workman at least was in possession of Willey's car when this tire and rim were removed and replaced by another not belonging to the car.

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To resume with Osborne's evidence, he said that about 10 p.m. on the evening of April 19, he received a telephone call from Workman who was enquiring about the whereabouts of Huculak:

Q. What did he say?

A. He asked me if I had seen Mr. Huculak.

Q. What did you say?

A. I said no.

Q. Anything else?

A. Oh, he said something about—I asked him what was the matter and he said everything went haywire. I said, you don't mean to tell me you went through with that thing and he said yes.

Q. Did you—did he ask or say anything more?

A. He asked me if I would phone around and see if I could get hold of Mr. Huculak.

Q. And what did you say?

A. I said I would, yes.

Q. Did you?

A. No sir I didn't.

Then, at 11.30 p.m., in response to a telephone call from Mrs. Huculak, Osborne and his wife went to the apartment where the Huculaks lived and which was close to where the Osbornes lived. He and his wife sat up with Mrs. Huculak until about 3 a.m. when Workman and Huculak came to the apartment together. Osborne noticed nothing unusual about Workman's appearance but he did notice that Huculak was very disturbed.

Well, Mr. Huculak was in pretty rough shape. I took him in the washroom and calmed him down. He kept mentioning about this guy's eyes sticking out of his head and something hanging out of the back of his head and he was just all shook up.

Workman also joined them in the bathroom. When they returned to the living-room Workman told Huculak to get rid of his shoes, which were very muddy. Mrs. Huculak cleaned them. Osborne said that the two stayed for about an hour and then went out again. On being asked whether either of them said anything before leaving, Osborne replied:

Yes, Mr. Huculak said there was a body in a shed somewhere and they had to go out and bury it.

Osborne had a further conversation with Huculak over the Easter week-end. He was not sure whether it was Satur-

day or Sunday. April 20 was Good Friday. This is the conversation that he reported with Huculak:

A. He mentioned something to me about something coming off a wrench or something, some bandages or tape or something that flew off.

Q. Did he say when it flew off or what caused it to fly off?

A. He said when the person was hit some tape or something on the end of this wrench flew off.

Q. Did he say anything else at this time?

A. Something about they would have to—if I remember correctly, they would have to go back to this house and get it, something to that effect.

Q. Back to the house?

A. To get this tape or whatever it was, I wasn't too clear on it, I wasn't listening to him too good.

Q. Did he say anything about the burying which they had talked about before?

A. Oh yes, he said they couldn't get this bury deep enough into the ground or something, the ground was frozen and they couldn't bury him deep enough.

On being brought back to the night of April 19 or the early morning of April 20, Osborne reported one further item of conversation—that they had to go back and clean up this house. Osborne also said that several days later Workman brought a Pontiac car into his driveway for the purpose of borrowing a hose to wash out the trunk of the car, and that a few days later he went for a drive in the country with Workman in the Pontiac. They turned off the main highway after driving south for about 12 miles and drove another 15 or 16 miles into the country. Workman stopped the car and told Osborne to drive down the road and come back in about 20 minutes to pick him up. Osborne said he did this but Workman said nothing about the purpose of the trip. He also said that at some time Huculak expressed a fear about some woman talking to the police about the night in question and that Workman said that he was not worried about that.

Rose Francis, the woman with whom Osborne was living and who passed as Mrs. Osborne, also gave evidence of the return of Huculak and Workman to the Huculak apartment about 3 a.m. in the early morning of April 20. She said that Huculak looked scared and that his wife cleaned his shoes, that Osborne, Workman and Huculak were all in the bathroom together and that Workman and Huculak remained in the apartment until about 4.30 a.m. She did not hear the

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conversation in the bathroom. She did hear Workman say that he was glad that it was a holiday week-end so that he could go back and clean the walls.

It is apparent that if the jury believed Osborne, there was a very strong circumstantial case against both the accused on a charge of capital murder. The learned trial judge gave clear directions on the question of credibility and pointed out that Osborne's criminal record went to the question of credibility. He also raised the question why it was that when Workman called about 10 p.m., he was enquiring about the whereabouts of Huculak if Workman and Huculak had been working in concert.

The defence submitted by counsel for Workman and put to the jury by the learned trial judge as applicable to both defendants was based upon what was alleged to be an infirm circumstantial case. With evidence of the kind that I have outlined and with the jury adequately charged on Osborne's evidence, including its weaknesses, I can see no possible ground for any instruction that, on any view of the evidence, Huculak could be an accessory after the fact and not a principal. Before this could be done, there must be found in the record some evidence which would convey a sense of reality in the submission: *Kelsey v. The Queen*[1]. Failure of counsel to raise the matter does not relieve the trial judge of his duty to place a possible defence before the jury but there must be something beyond fantasy to suggest the existence of the duty. The Court of Appeal, in the exercise of its function under s. 583A(3)(*b*) of the *Criminal Code,* in dismissing the appeals found no error on this ground and I respectfully agree.

There was a full review of the evidence in the charge of the learned trial judge. It was again reviewed in the reasons of the Court of Appeal and, finally, before this Court. My conclusion is firm that there was ample evidence upon which a jury could find beyond a reasonable doubt that Willey was dead, even though his body had not been found, and that the two accused were guilty as principals in his killing.

While there might be a question of the admissibility against Huculak of evidence of the solicitor's conversation with Workman in February 1961, it was admissible against Workman for the reasons given by the Court of Appeal.

[1] [1953] 1 S.C.R. 220, 226, 105 C.C.C. 97, 16 C.R. 119.

Huculak was not identified with any motive or animosity that Workman may have entertained and this was plain to be seen. But on the evidence of Osborne, which the jury must have accepted, Huculak was actively involved in the plan and in its execution. It is for this reason that I would hold that there was no substantial wrong or miscarriage of justice in the judge's failure to instruct the jury that the solicitor's evidence was admissible only against Workman.

The appeals of both appellants must be dismissed.

The judgment of Ritchie and Hall JJ. was delivered by

RITCHIE J. (*dissenting as to Huculak's appeal*):—This appeal is brought pursuant to the provisions of s. 597A of the *Criminal Code* from a judgment of the Appellate Division of the Supreme Court of Alberta[1] affirming the conviction of both the appellants on a charge of the capital murder of Frank Willey.

The evidence has been reviewed in the reasons for judgment of my brother Judson, which I have had the advantage of reading, and it would be superfluous for me to repeat it.

The main argument advanced by Mr. Nugent on behalf of the appellant Huculak was that the evidence against his client was not necessarily inconsistent with his having been an accessory after the fact rather than a party to the murder, and although this defence was not raised by counsel at the trial the failure of the trial judge to direct the jury with respect to it nevertheless constituted a miscarriage of justice entitling Huculak to a new trial.

It appears to me to be established that the failure of a defence counsel to advance an alternative argument does not relieve the judge from the duty of directing the jury with respect to it if there is any evidence to justify such a direction. This is supported by the decision of Viscount Simon in *Mancini v. Director of Public Prosecutions*[2], and the decision of Lord Reading in *Rex v. Hopper*[3], is to the same effect.

In this Court, in the case of *McAskill v. The King*[4], Duff J., as he then was, had occasion to say:

> The able and experienced judge who presided at the trial properly directed the attention of the jury to the defence as it was put before them by counsel for the prisoner; and having done this, he did not ask

[1] [1963] 1 C.C.C. 297.
[2] [1942] A.C. 1 at 7, 28 Cr. App. R. 65.
[3] [1915] 22 K.B. 431, 11 Cr. App. R. 136.
[4] [1931] S.C.R. 330, 3 D.L.R. 166, 55 C.C.C. 81.

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them to apply their minds to the further issue which we have just defined. *It was the prisoner's right, however, notwithstanding the course of his counsel at the trial to have the jury instructed upon this feature of the case.* We think, therefore, that there must be a new trial.

The position of a Court of Appeal in such circumstances appears to me to be well described in the decision of Lord Tucker speaking for the Judicial Committee of the Privy Council in *Bullard v. The Queen*[1]:

> In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. *Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible.* . . . Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached. Their Lordships are accordingly of opinion that the verdict of guilty of murder cannot stand in this case.

The same considerations, in my opinion, apply wherever it can be said that any alternative defence could properly arise on the facts in a murder case but it must be borne in mind that when non-direction by a trial judge is made a ground of appeal it is to be considered subject to the conditions outlined by Fauteux J. in *Kelsey v. The Queen*[2], where he said:

> The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance.

I am satisfied that there is ample evidence in the record before us to justify the jury in finding that Willey was killed, that Workman had a motive for killing him and that he did in fact cause him to be lured to a partially-built house where he was killed. The circumstances are also undoubtedly consistent with Huculak having taken part in the murder, but the narrow question to be considered is whether it can be said with certainty that a rational jury, after being instructed in the manner now suggested, would necessarily have concluded, in light of all the evidence,

[1] (1957) 42 Cr. App. R. 1 at 7.
[2] [1953] 1 S.C.R. 220 at 226, 105 C.C.C. 97, 16 C.R. 119.

that these circumstances were entirely inconsistent with Huculak's participation being limited to assisting in the disposal of the body and the cleaning up of the mess occasioned by the murder.

While it is appreciated that motive is not a necessary ingredient in the crime of murder, it nevertheless appears to me that the strong motive proved against Workman who devised and propounded the plan for killing Willey, and the complete absence of any evidence of motive for murder on the part of Huculak who heard the plan for the first time on the morning of the day the deed was done, place the two appellants in somewhat different categories and that this is something which can properly be taken into consideration in determining whether a separate defence should have been suggested to the jury by someone on Huculak's behalf. Save as hereinafter set forth, no attempt was made to sever the defences in any way.

The learned trial judge, during the course of his instructions to the jury as to the law, made the following statements:

> 1. The onus is on the Crown to establish to you, to your satisfaction, first, that Frank Willey is dead; secondly, that Frank Willey came to his death as a result of the actions of these two accused or one of them, or either of them, and that when the act causing death was carried into effect it was carried into effect as part of a planned and premeditated scheme to kill Frank Willey.
>
> 2. You must consider the evidence to determine the question of whether or not he came to his death through the criminal act or acts of the two accused in concert or either one of them by themselves.
>
> 3. If, however, you are satisfied that the death came about, that it was done by the accused or one or either of them, yet you are not satisfied of the planning and deliberation but you were satisfied that the two accused or either of them intended to kill but without the planning and deliberation then the verdict would be of murder, not capital murder . . . What is more, and I should make it clear to you, that if in your consideration of the evidence there were doubts in your minds as to whether one or the other of the two accused has the essential elements proved against him but that you are satisfied that it has been proved against the other, you can only convict the one.

In my view, these very proper instructions to the jury cannot be considered as a substitute for an express direction as to the defence that Huculak was an accessory after the fact if it can be said, to use the language of Fauteux J. in the *Kelsey* case, *supra,* that there exists "in the record some evidence or matter apt to convey a sense of reality" to such a defence.

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I think it must be accepted that the jury believed the evidence to the effect that on the morning of the 19th of April Workman proposed that Huculak and Osborne should join him in carrying out his plan to kill a man which Osborne refused to do, that Willey was lured to an empty house which two men were seen to be leaving at 9:45 p.m. in cars not dissimilar to Willey's Oldsmobile and Workman's rented Chevrolet, and that about 15 minutes after the murder had been committed Workman was telephoning to Osborne telling him that everything had gone "haywire" and asking him if he could "get hold of Huculak".

In my view, the question of whether or not a jury could properly have accepted the theory that the circumstances were not inconsistent with Huculak's involvement being limited to the role of an accessory after the fact must depend in large measure upon the weight to be attached to this telephone conversation, which was reported by Osborne as follows:

Q. From whom did you get the call?
A. From Mr. Workman.
Q. The accused?
A. Yes sir.
Q. What did he say?
A. He asked me if I had seen Huculak.
Q. What did you say?
A. I said no.
Q. Anything else?
A. Oh, he said something about—I asked him what was the matter and he said everything went haywire. I said you don't mean to tell me you went through with that thing and he said yes.
Q. Did you—did he ask or say anything more?
A. He asked me if I would phone around and see if I could get hold of Mr. Huculak.
Q. And what did you say?
A. I said I would, yes.
Q. Did you?
A. No sir, I didn't.

The only comment on this conversation made to the jury by anyone was the following observation by the learned trial judge:

Now one of the things that struck my mind as being a matter to consider in weighing the entire evidence of Osborne, and this is no reflection of his credibility, but on the basis of it being true one wonders why he gave evidence to the effect that at something like 11 o'clock at night on the evening of the 20th of April 1962 he had a phone call from Workman

in which Workman said something in effect that things had gone haywire. He wanted to know where Huculak was and Workman asked him, he didn't go through with that thing and he said yes. The query comes to mind that if Workman and Huculak had been working in concert in carrying out this plan just why it would be that Workman wouldn't know where Huculak was at that time of night when it is remembered that they both ultimately came into Huculak's suite at something after 3 o'clock in the morning. It just leaves a query in one's mind.

It is obvious that in this passage where the learned judge said "and Workman asked him, he didn't go through with that thing . . ." he meant "and Osborne asked him . . ." and it is equally clear from the evidence that the call was at 10 o'clock on the 19th and not at 11 o'clock on the 20th.

It is now suggested that the trial judge should not have stopped at telling the jury that this evidence left "a query" in his mind but that he should have gone on to point out that it was open to them to reach the conclusion that Huculak was an "accessory after the fact" rather than a principal in the murder, if they took the view that the other evidence, viewed in the light of this telephone conversation, was not inconsistent with Huculak, having backed out of the plan, failing to turn up at the time of the murder and subsequently having been persuaded by Workman to help in the disposal of the body.

The question, of course, is whether some such instruction should have been given by the learned trial judge and whether if it had been given a rational jury could have concluded that the whole evidence viewed in this manner was not entirely inconsistent with Huculak being an accessory after the fact rather than a party to the murder.

Osborne's story of the return of Huculak and Workman to the Huculak apartment at 3 o'clock, and of Huculak's wild statements about "a guy's eyes sticking out of his head and something hanging out of the back of his head" are fully reported in the reasons of my brother Judson. It will be noted that Huculak spoke of a body being in a shed somewhere and that they had to go out and bury it, and also that there was talk of going "back" to the scene of the crime, and a statement by Huculak which was not made until a day or two after the murder that they would have to go there to get "some bandages or tape or something that flew off" the end of the wrench when the person was hit.

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In order to find that there is any substance to the defence now suggested, it must be accepted that the muddy condition of Huculak's shoes at 3 o'clock in the morning and his description of the dead body which "they had to go out and bury" were not inconsistent with his role being limited to assisting the murderer to escape detection by getting rid of the body and the evidence of violence, and that his knowledge of the bandages or tape "that flew off" the wrench which he did not communicate to Osborne until much later was something which Workman had told him about when they were cleaning up at the scene of the crime. It is also necessary to accept Mr. Nugent's submission that the heel mark in the blood on the floor of the partially-built house which the police expert stated could have been made by Huculak's shoe might have been left when Huculak went there to clean up the mess.

While I am bound to say that these suppositions are improbable this does not answer the question of whether the jury should have been instructed on this feature of the case. The question is by no means an easy one, but I have come to the conclusion that under all the circumstances such a direction should have been given in this case.

I do not wish to be construed as saying that a trial judge, when addressing a jury in a criminal case, is under a duty to explore all the remotest and most fantastic possibilities but I do think that in a capital case where the two accused are jointly charged and no independent defence has been advanced to the jury on behalf of the one of them who has not been shown to have any motive for the crime then it does become necessary for the trial judge to scrutinize the circumstances with additional care in a conscious effort to insure that the jury has been informed of all defences for which any support can be found in the evidence. If under such circumstances some such defence should escape the notice of the trial judge then, in my view, the accused is entitled to a new trial.

Although I am of opinion that it is extremely unlikely in the present case that the jury would have found Huculak to be an accessory rather than a principal, it cannot be said

to be impossible. In this regard, I would adopt the language employed by Humphreys J. in *Rex v. Roberts*[1], where he said:

> The Court . . . cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them.

In view of the above, I would allow the appeal of William Huculak, set aside his conviction and direct a new trial.

As to the case of Workman, I agree with the Court of Appeal that the evidence against him is overwhelming and I would dismiss his appeal.

Both appeals dismissed, RITCHIE *and* HALL JJ. *dissenting as to H's appeal.*

Solicitors for the appellant Huculak: Main, Dunne, Nugent & Forbes, Edmonton.

Solicitors for the appellant Workman: Lieber, Romaine & Koch, Edmonton.

Solicitor for the respondent: The Attorney-General for Alberta.

THEODORE GEORGE CHOUINARD ...APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Jan. 31
Jan. 31

IDA McDONNELL .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Summary convictions—Appeals—Whether affidavit of service identified the respondent sufficiently—Criminal Code, 1953-54 (Can.), c. 51, ss. 722, 723.

The information upon which the appellant Chouinard was convicted on summary conviction of impaired driving described the informant as "Roger Eugene Moore, a member of the Royal Canadian Mounted Police, Saskatoon, Sask." The affidavit of service of the notice of appeal to the District Court stated that Corporal Roger E. Moore of the Royal Canada Mounted Police was served with the notice, but the affidavit did not state that Moore was the informant. Pursuant

*PRESENT: Taschereau, Cartwright, Fauteux, Martland and Ritchie JJ.

[1] [1942] 1 All E.R. 187, 28 Cr. App. R. 102 at 110.

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to an objection by the Crown, the District Court Judge refused to hear the appeal on the ground that he had no jurisdiction since he could not satisfy himself that the respondent had been served with the notice of appeal as required by s. 722 of the Criminal Code. The Court of Appeal dismissed the appeal from that judgment. The appellant was granted leave to appeal to this Court.

A similar situation presented itself in the case of the appellant McDonnell charged and found guilty of unlawfully selling liquor, where the informant was described as "Lee J. Corey, of Saskatoon, Sask., Peace Officer".

A. W. Prociuk, for the appellants.

B. L. Strayer, for the respondent.

At the conclusion of the argument, the following judgment was delivered

TASCHEREAU J. (orally, for the Court):—It will not be necessary to hear you in reply, Mr. Prociuk. We are all of opinion that this appeal should be allowed. We think that the affidavit of service which was filed was sufficient, as the presumption would be that Roger E. Moore was the respondent, unless that fact was questioned, which it was not. Had it been doubtful whether Moore was the respondent, we are of opinion that the learned District Court Judge could and should have looked at the information which would have shown at once that Moore was in fact the respondent.

We would accordingly allow the appeal, set aside the judgment of the Court of Appeal[1] and of the District Court Judge and remit the case to the District Court Judge to be heard and disposed of.

The decisions of this Court, referred to in the reasons of the Court of Appeal, are not decisive of the point raised on this appeal. The appellant is entitled to his costs throughout.

The decision in the Chouinard case will apply also to the McDonnell case. That appeal also will be allowed with costs throughout.

Appeals allowed with costs.

Solicitors for the appellants: McCool, Prociuk & Co., Saskatoon.

Solicitor for the respondent: D. A. Todd, Regina.

[1] (1961-62), 36 W.W.R. 684, 131 C.C.C. 346, 36 C.R. 421.

JOHN MAZUR (*Defendant*) .....APPELLANT;

1963

*Jan. 23
May 1

AND

IMPERIAL INVESTMENT CORPORATION LTD. (*Plaintiff*) .... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Bills and notes—Promissory note signed in blank—Authority given holder to complete—Holder in due course—Bills of Exchange Act, R.S.C. 1952, c. 15, ss. 31, 32.

K told S, the manager of a car sales agency, that he wished to raise money on a truck of which he was the owner. S inquired of the plaintiff finance company, who informed him that K was not a suitable risk. S then suggested the use of an accommodation party and K asked the defendant M to let him use his name and credit to obtain a loan. The latter so agreed and signed a blank form of conditional sale contract and a blank form of promissory note which were presented by S to the plaintiff. The conditional sale contract purported to sell the truck for a price of $18,500, with a down payment of $6,500, leaving an unpaid cash balance of $12,000. Finance charges were added, bringing the total up to $14,326.96, which was to be paid in specified instalments. S filled in the first part of the document down to the $12,000 balance on the purchase price, and the rest of the document was filled in by the plaintiff who also filled in the promissory note. The plaintiff discounted the note and paid S $8,000 by cheque and retained $4,000 in S's holdback account.

After M had signed the documents, K found that he could raise the money from another finance company and thereupon told S to call off the deal with M and the plaintiff. However S fraudulently retained the moneys received from the plaintiff and concealed this fact from both M and K. In an action brought on the promissory note, the plaintiff obtained judgment at trial and this judgment was affirmed on appeal with an increase in amount. The defendant appealed to this Court.

Held (Cartwright and Hall JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Martland and Judson JJ.: The plaintiff took the note for full value and was a holder in due course. It was not open to this Court to draw inferences of a conditional delivery and failure to fill in the document in accordance with the authority given, in the face of the evidence and the unanimous findings which were at the basis of the judgments of the trial judge and the Court of Appeal. Nor was there any substance in the defence that the documents were delivered conditionally upon the understanding that K would get the proceeds. This was the understanding, but it presupposed use of the documents as honest documents; S converted the money after they had been used for the purpose for which they were intended.

Per Cartwright and Hall JJ., *dissenting:* While the matter was not spelled out in detail, in any one sentence in the evidence, a reading of all the record made it clear that M entered into the deal on the stated under-

*PRESENT: Cartwright, Fauteux, Martland, Judson and Hall JJ.

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standing that (i) the liability to the plaintiff which he would be assuming would be secured by a lien on K's truck, (ii) that the proceeds of the deal would be paid to K, and (iii) that the total amount raised was to be $10,000. The third of these items was alone decisive of this appeal. The note was filled up for $14,326.96, which was the amount required to yield not $10,000 but $12,000. Accordingly, the note, not having been filled up strictly in accordance with the authority given (contrary to the requirements of s. 32 of the *Bills of Exchange Act*) but actually in contravention of that authority in respect of the amount to be raised, never became an enforceable note at all.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], dismissing an appeal from a judgment of Riley J. Appeal dismissed, Cartwright and Hall JJ. dissenting.

J. W. K. Shortreed, Q.C., for the defendant, appellant.

J. E. Redmond, for the plaintiff, respondent.

The judgment of Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—Imperial Investment Corporation Ltd., which is a company engaged in financing the purchase of cars, sued the appellant John Mazur on a promissory note. The finance company obtained judgment at trial and this judgment was affirmed on appeal[1] with an increase in amount. The maker of the note now appeals.

The defences submitted on behalf of the maker were (1) that the finance company was not a holder in due course, and (2) that the note was signed in blank, delivered subject to conditions which were not fulfilled, and was not filled in in accordance with the authority given.

Mazur signed the note as maker for the accommodation of one Karraja. Karraja was the owner of a 12-ton Mack tandem truck. Early in 1958, he told one James Sheddy, who operated a company known as A. C. Car Sales & Service Ltd., that he wished to raise money on this truck. Sheddy inquired of the finance company, who informed him that Karraja was not a suitable risk. It does not appear from the evidence what legal arrangements were to be made to put through this proposed loan. Sheddy then suggested the use of an accommodation party and Karraja asked Mazur to let him use his name and credit to obtain a loan.

[1] (1962), 39 W.W.R. 149, 33 D.L.R. (2d) 763.

The finance company approved of Mazur as a suitable risk. Mazur then went to Sheddy's office where he signed a customer's statement giving particulars of his assets, a conditional sale contract and a promissory note. Mazur said, on discovery, that he did not recollect whether there was any writing on the conditional sale contract when he signed it. On cross-examination at the trial, he said there was nothing on it. As to the promissory note, he said at the trial that it was in blank, that he did not read it but just signed on the line for his signature. He did admit that he knew what he was signing. He was in the transport business himself and had had many dealings with finance companies.

Sheddy presented the conditional sale contract and the promissory note to the finance company. The conditional sale contract purports to sell the truck for a price of $18,500, with a down payment in cash of $6,500, leaving an unpaid cash balance of $12,000. The finance charges are then added, bringing the total up to $14,326.96, which was to be payable in 17 instalments of $797, and a final instalment of $777.96. I do not think that there is any doubt that Sheddy filled in the first part of the document down to the $12,000 balance on the purchase price, and that the rest of the document was filled in in the office of the finance company. The promissory note is filled in in typewriting in accordance with the conditional sale contract, and everything points to this having been done in the office of the finance company.

Mazur said in evidence:

> Q. In your discussions with Mr. Sheddy when you were at his office to sign whatever it was that you signed, did you tell Mr. Sheddy what you wanted him to do with those documents?
>
> A. No I did not.
>
> Q. Did he tell you what he was going to do with them; that is, did he tell you anything about where he would take them or what he would write on them, anything of that sort?
>
> A. No.

On discovery he had said:

> Q. That was not the question, the question was did you know that this transaction was set up to describe you as purchaser of this vehicle from A. C. Car Sales and Service?
>
> A. I will answer yes to that.

Nowhere in the record is there any evidence of any attempt to have these documents conform to reality. These documents appear to indicate a *bona fide* sale but the sale

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was entirely fictitious to the knowledge of all three participants in a scheme to induce the finance company to discount a note. The fraud of all three is obvious but, in addition, Sheddy kept the proceeds of the discount for his own use.

The learned trial judge spoke harshly of Sheddy and refused to believe his evidence when he said that the finance company knew that it was an accommodation transaction. But willingness to engage in this trickery is an equal reflection on the other two. The note was discounted on January 20, 1958. Mazur said that about three weeks later he received a booklet from the finance company showing the payments to be made and that he made the first three payments with money supplied by Sheddy. He knew exactly how the documents had been used when he received this booklet and he did nothing about it for three months. Then he went to Sheddy, who said that he would cancel the contract. Mazur then produced his copy of the contract, which contained all the details, including the finance charges, and Sheddy then wrote the word "cancelled" on Mazur's copy.

Karraja had no further interest in the transaction. He did not sign anything and he had not parted with his truck. He says that he had told Sheddy that he was no longer interested in this transaction because he was making arrangements to get the money elsewhere. Sheddy says that he was only told this after the transaction had gone through. There is no evidence that Karraja ever communicated with Mazur to tell him before the documents were used to get them back because they were not needed. There is evidence from Sheddy that his company had no money to acquire the truck from Karraja and it is to be remembered that he had a substantial equity in his truck. It is clear that he never intended to part with it.

The learned trial judge made very clear findings of fact which, in my respectful opinion, are fully supported by the evidence. He said[1]:

> The evidence of the defendant was that he gave no instructions to Sheddy as to what should be done with the note, nor did Sheddy tell him what was to be done with the note. There is no evidence that anything which may have passed between Sheddy and Karraja at the time of execu-

[1] (1962), 37 W.W.R. at p. 402.

tion of the documents or later was communicated to Mazur, and there is every indication that it was not. Therefore, the *prima facie* authority to complete the note given by sec. 31 must operate in this case.

The Court of Appeal came to the same conclusion[1]:

> I have given consideration to the question of whether it was established by the filling in of material parts of the conditional sale agreement by the plaintiff that the conditional sale agreement became void to the knowledge of the plaintiff. If it did so become void to the knowledge of the plaintiff, it would be necessary to consider the application of the decision in the Supreme Court of Canada in *Traders Finance Corp. v. Casselman*, 22 D.L.R. (2d) 177, [1960] S.C.R. 242, in the facts of this case to the question of whether the promissory note is enforceable. I have considered such cases as *Tayler v. Great Indian Peninsula R. Co.* (1859), 4 De G. & J. 559, 45 E.R. 217; *Société Générale de Paris v. Walker et al.* (1885), 11 App. Cas. 20; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, 159 E.R. 73; and *Wilson & Meeson v. Pickering*, [1946] 1 K.B. 423. I have reached the conclusion that the defendant impliedly authorized the filling in of the conditional sale agreement for the purpose of assisting in the raising of money for Karraja, and that therefore it cannot be found that that agreement became void to the knowledge of the plaintiff by reason of the filling in of particulars which the defendant must have known would have to be filled in.

Nowhere can I find that these conclusions lack foundation and that Mazur's signature of the documents was conditional upon the finance company having a lien on the truck and that the total net amount was to be limited to $10,000. The figure of $10,000 was mentioned, according to Karraja, in his first conversation with Sheddy. Sheddy says that the figure mentioned was $10,000 or $12,000. Mazur said that he understood that the figure was $10,000 but, against this, he was in possession of the completed contract and the booklet of payments showing that the figure was $12,000 and he made no protest.

I do not think that it is open to this Court to draw inferences of a conditional delivery and failure to fill in the document in accordance with the authority given in the face of this evidence and the unanimous findings which are at the basis of the judgments of the trial judge and the Court of Appeal. Nor is there any substance in the defence that the documents were delivered conditionally upon the understanding that Karraja would get the proceeds. Of course this was the understanding but it presupposes use of the documents as honest documents. Sheddy converted the money after they had been used for the purpose for which they were intended.

[1] [1962] 33 D.L.R. (2d) at p. 770.

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The finance company took this note for full value. It paid Sheddy $8,000 by cheque and retained $4,000 in Sheddy's account, called a holdback account. At the time of the transaction, Sheddy was overdrawn in this account by $1,362.02. After the $4,000 was credited, he had a credit balance of $2,637.98.

Much of the evidence at trial was directed to show that the finance company did not take this note in good faith because it knew that the transaction was fictitious or had sufficient knowledge of the facts to bring home to it knowledge of its nature. With a note taken for full value and the rejection of Sheddy's evidence, any attack on the judgment on this ground must fail.

The judgment of the trial judge awarded the finance company only $5,600, namely, $8,000 less the 3 payments of $800 made. The plaintiff cross-appealed and asked that its judgment be increased to $9,600. This cross-appeal was allowed and, in my opinion, correctly. Why the plaintiff did not cross-appeal for judgment for the face value of the note, namely, $14,326.96 less the 3 payments, I do not know.

The plaintiff is a holder in due course of this note. I would affirm the judgment of the Court of Appeal and dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a unanimous judgment of the Appellate Division of the Supreme Court of Alberta[1] dismissing an appeal from the judgment of Riley J. and allowing a cross-appeal whereby the judgment was increased from $5,600 to $9,600 together with interest and costs.

The facts are not complicated. The learned trial judge has stated that Sheddy is unworthy of belief, but he has made no similar observation as to either Mazur or Karraja and, after a careful perusal of the whole record, I am unable to find any reason that the evidence of these two witnesses where it is uncontradicted, unshaken on cross-examination and not inherently improbable should not be acted on.

In January 1958, one Karraja approached James Sheddy, the manager of A. C. Car Sales & Service Ltd. seeking to borrow $10,000 on a 12-ton truck owned by Karraja.

[1] (1962), 39 W.W.R. 149, 33 D.L.R. (2d) 763.

Sheddy asked the respondent whether it would make the advance requested and, after the respondent had made some investigation as to the credit of Karraja, he was advised that it would not. Sheddy suggested to Karraja that if he knew anyone whose credit rating was good and who was willing to assist him the matter could be arranged.

Karraja then asked the appellant if he would allow his name to be used to enable Karraja to obtain the advance and the appellant consented.

Following this Mazur and Karraja went together to Sheddy's office. Karraja stated that he wanted $10,000 "to himself", that is to say, clear after payment of financing and other charges.

It was agreed that Sheddy would prepare a conditional sale agreement under the terms of which A. C. Car Sales & Service Ltd. would sell Karraja's truck to Mazur. Mazur would sign this agreement as purchaser and would also sign a promissory note for the balance due under the agreement. The conditional sale agreement and the note would be transferred to the respondent and it would make the necessary advance to A. C. Car Sales & Service Ltd. which in turn would pay it over to Karraja. Both Mazur and Karraja were familiar with the practice of purchasing trucks under conditional sale agreement.

There was nothing either fraudulent or unlawful in this proposal and it could have been carried out by Karraja transferring the title to his truck to A. C. Car Sales and by that company, in turn, making the sale to Mazur, it being agreed as between Mazur and Karraja that Mazur would not in fact be called upon to pay as the payments would be made by Karraja. But for the other arrangement made by Karraja, to be referred to later, there is no reason to suppose that it would not have been carried out.

While the matter is not spelled out in detail, in any one sentence in the evidence, a reading of all the record appears to me to make it clear that Mazur entered into the deal on the stated understanding that (i) the liability to the respondent which he would be assuming would be secured by a lien on Karraja's truck, (ii) that the proceeds of the deal would be paid to Karraja, and (iii) that the total net amount raised was to be $10,000. While each of these three

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items was no doubt of importance to Mazur it is the third which, in my opinion, is decisive of this appeal and which alone requires further consideration.

On this understanding Mazur signed a printed form of conditional sale agreement and a printed form of promissory note. I agree with the finding of Smith C.J.A. that:

> It seems probable that the conditional sale agreement and the promissory note were entirely blank when they were signed by Mazur.

On the argument before us it was conceded that the promissory note was signed in blank and that all the blanks were later filled up by employees of the respondent.

Sheddy inserted in the form of conditional sale agreement which Mazur had signed the description of the truck, a figure of $18,500 as sale price, a figure of $6,500 as cash payment and an apparent unpaid cash price balance of $12,000.

Sheddy then took the documents to the respondent.

The respondent inserted in the conditional sale agreement the cost of insurance, the registration fee and the "finance charge" and added these to the unpaid cash price balance, making a total of $14,326.96. The respondent also filled in blanks so as to provide for payment of seventeen instalments of $797 each and a final instalment of $777.97, the first being payable on February 20, 1958, and the remainder on the 20th of each successive month. In the promissory note the respondent filled in $14,326.96 as the sum payable, and inserted the same dates and amounts of instalments.

A. C. Car Sales Ltd. assigned the conditional sale agreement and endorsed the promissory note to the respondent which then issued a cheque to A. C. Car Sales & Service Ltd. for $8,000 and placed $4,000 to its credit in a "holdback" account.

When he had been advised by Sheddy that the respondent would not make the advance to him Karraja had commenced negotiations with another finance company and after Mazur had signed the forms referred to above Karraja found that this company would advance $10,000 on his truck. He thereupon told Sheddy to call off the deal with Mazur and the respondent. Sheddy says that at this time, he had already turned over the documents to the respondent and received the $8,000; whether or not this is so does

not appear to me to be of importance. Sheddy, as has been found, fraudulently retained the moneys received from the respondent and concealed this fact from both Mazur and Karraja.

The action is brought on the promissory note. It was blank in all material particulars when received by the respondent and the blanks were filled in by the respondent. In my view, the respondent can succeed in the action only if it was entitled to fill in these blanks under ss. 31 and 32 of the *Bills of Exchange Act,* which read as follows:

> 31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.
>
> 32. (1) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given; but where any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.
>
> (2) Reasonable time within the meaning of this section is a question of fact.

It is clear that Mazur placed his signature on the blank printed form of note and delivered it to Sheddy in order that it might be converted into a promissory note. It is also clear that Mazur became a party to the note prior to its completion and consequently he is liable on it only if it was filled up within a reasonable time and "strictly in accordance with the authority given". It was, no doubt, filled up within a reasonable time but it seems to me that the authority given by Mazur to Sheddy was limited to filling it up (and also filling up the conditional sale agreement which Mazur had signed in blank) for such amount as was necessary to yield $10,000 to Karraja. In fact the note was filled up for $14,326.96, which was the amount required to yield not $10,000 but $12,000.

The note, not having been filled up strictly in accordance with the authority given but actually in contravention thereof in the respect just mentioned, never became an enforceable note at all.

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The situation would, of course, have been different if Sheddy had filled that note up and then negotiated it to the respondent. Had that happened, the finding of the learned trial judge concurred in by the Court of Appeal that, whether or not it was negligent, the respondent acted honestly and took the note in good faith and for value, would have entitled it to succeed.

In the case at bar, however, the respondent itself filled up the note. In doing so, I will assume that it was acting honestly in the sense that, relying on Sheddy, it believed that it was entitled to fill up the note as it did but this does not assist it when, in fact, the note was filled up in a manner which was not in accordance with the authority given by Mazur.

I do not find it necessary to review the authorities which were discussed in the full and helpful arguments addressed to us by both counsel. Once it is established that all the blanks in the note were filled up by the respondent itself the only question requiring decision is whether they were filled up strictly in accordance with the authority given. If there has been a *de facto* exceeding of the authority that is an end of the matter. Authority to fill up a note for the amount of $10,000 plus incidental charges, is exceeded when the note is filled up for the amount of $12,000 plus incidental charges.

For these reasons I am of opinion that the appeal should be allowed, the judgments below set aside and the action dismissed with costs throughout.

HALL J. (*dissenting*):—The facts have been set out in the reasons for judgment of my brother Cartwright which I have had the advantage of reading and with which judgment I concur. However, I would like to comment on an important aspect of the case which I think influenced the learned trial judge and the Court of Appeal and was absent in this Court, and which, accepting the findings of the learned trial judge as to credibility, brings me to a conclusion opposite to that reached in the Courts below. The crucial fact in this case, in my judgment, is that the promissory note sued on bore only the signature of the appellant, Mazur, when it came into the possession of the respondent. It is obvious from reading the judgment of Riley J. that he predicated his finding that the respondent became the

holder in due course of the note upon the view that the appellant had not satisfied the onus of proving that the note was not complete and regular on its face when delivered to the respondent, for he says in part:

> The Defendant has not satisfied the onus of proving that the note was not complete and regular on its face when delivered to the Plaintiff. The only evidence of the condition of the note when delivered to the Plaintiff is that of Sheddy, who says that he did not do the typewriting. Sheddy was a most unsatisfactory witness. In cross-examination he admitted retaining the moneys advanced by the Plaintiff although he had promised Karraja that he would obtain money for him. He also admitted numerous other falsehoods, including his statements to Karraja that he would cancel the arrangement, his promise to Mazur that he would cancel the arrangement, along with numerous other similar representations. These admissions establish that Sheddy was not a credible witness, that his evidence should not be believed, and that therefore in the absence of evidence satisfying the court that the note was not complete and regular on the face of it when delivered to the Plaintiff, the Defendant has failed to satisfy the onus and the Plaintiff must be found to be a holder in due course of the note entitled to recover upon it.

There was still an element of uncertainty on this very point when the case was before the Court of Appeal which the Chief Justice of Alberta dealt with as follows:

> It seems probable that the conditional sale agreement and the promissory note were entirely blank when they were signed by Mazur.

On the argument before this Court, it was conceded that the document bore only the signature of the appellant when it came into the possession of the respondent. It is perhaps because this outright admission was not made to Riley J. and to the Court of Appeal that both Riley J. and the Chief Justice of Alberta relied so strongly on s. 31 of the *Bills of Exchange Act* and not on s. 32(1) which reads:

> 32. (1) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, *and strictly in accordance with the authority given;* but where any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given. (The italics are mine.)

While Riley J. disbelieved Sheddy and said that Sheddy was not a credible witness, he made no adverse findings as to the credibility of Karraja or the appellant. Their evidence establishes, as my brother Cartwright has pointed out, that when the appellant put his signature on the blank

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promissory note form he did so on certain conditions, one of those being that a loan to yield $10,000 to Karraja was to be obtained. The note was actually filled in to yield $12,000 and not $10,000 and therefore not strictly in accordance with the authority given. Riley J. appears to have dealt with the appellant as an innocent party as well as the respondent. He quotes from *London and South Western Bank v. Wentworth*[1]:

> This language [i.e., the term 'estoppel'] might be not improperly applied to the present case, but, for our own part, we should prefer not to use the word 'estoppel', which seems to imply that a person by his conduct is excluded from showing what are the true facts, but rather to say that the question is whether, when all the facts are admitted, the acceptor is not liable upon the well-known principle that where one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the third person to commit the fraud.

indicating he did not consider the appellant in the same category as Sheddy or a party to Sheddy's fraud.

Appeal dismissed with costs, CARTWRIGHT *and* HALL JJ. *dissenting.*

Solicitors for the defendant, appellant: Shortreed, Shortreed, Stainton & Enright, Edmonton.

Solicitors for the plaintiff, respondent: Bishop, McKenzie, Jackson, Latta, Redmond & Johnson, Edmonton.

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*Apr. 29
May 6

HER MAJESTY THE QUEEN.. .....APPLICANT;

AND

ADRIENNE LAROCHE .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Practice and Procedure—Jurisdiction—Criminal law—Application for leave to appeal by Crown—Whether on a question of law alone.

The accused was convicted of unlawfully converting to her own use a sum of money, the property of a municipal corporation of which she was an employee, and thereby stealing the same. The Court of Appeal quashed the conviction and directed a new trial. The Crown sought leave to appeal to this Court on the following question of law: "Whether the Court of Appeal erred in law in holding that the learned

*PRESENT: Cartwright, Martland and Ritchie JJ.

[1] (1880), L.R. 5 Ex. D. 96 at 105.

trial judge misdirected the jury as to the theory of the defence". The accused opposed the motion on the ground, inter alia, that the judgment of the Court of Appeal was based on two separate and distinct grounds, the first of which did not raise a question of law alone and that, therefore, this Court was without jurisdiction to entertain the appeal upon it.

Held: The application for leave to appeal should be granted.

Where a Court of Appeal has quashed a conviction on two grounds of which one is, and the other is not, appealable to this Court, the appeal to this Court must be dismissed. But in view of the state of the authorities as to whether this Court will entertain appeals based on the ground of the failure of the trial judge to deal adequately with the evidence in his charge to the jury, the point raised here should be dealt with by the Court constituted to hear an appeal rather than on an application for leave. Assuming therefore, for the purposes of this application, that both of the grounds on which the Court of Appeal proceeded raised points of law as to which this Court has jurisdiction, leave to appeal should be granted. However, this will not prevent the accused from urging her objection at the hearing of the appeal.

APPLICATION by the Crown for leave to appeal from a judgment of the Court of Appeal for Ontario quashing the conviction of the accused and ordering a new trial. Application granted.

P. Milligan, Q.C., for the applicant.

G. A. Martin, Q.C., for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—Adrienne Laroche was convicted before His Honour Judge Macdonald and a jury on February 16, 1962, on an indictment charging that she did between the 17th day of September, 1956 and the 17th day of May, 1960, at the Town of Eastview, in the County of Carleton, unlawfully convert to her own use money to the amount of $10,790.52, the property of the Municipal Corporation of the Town of Eastview and did thereby steal the same, contrary to the Criminal Code of Canada.

She appealed to the Court of Appeal on a number of grounds, some of which that Court found it unnecessary to discuss. The Court of Appeal by a unanimous judgment delivered by McLennan J.A. allowed the appeal, quashed the conviction and directed a new trial.

The Crown seeks leave to appeal to this Court on the following question of law:

Whether the Court of Appeal erred in law in holding that the learned trial judge misdirected the jury as to the theory of the defence.

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The question as stated appears to be one of law but counsel for the respondent opposes the motion on the ground, inter alia, that the judgment of the Court of Appeal was based upon two separate and distinct grounds which he summarizes as follows:

> (i) That the trial was unsatisfactory because the trial judge, while he put the theory of the defence to the jury, did not discuss the evidence relating to that theory in a sufficiently comprehensive way.
>
> (ii) That the trial judge erred in directing the jury that they ought to acquit if the accused honestly thought she was 'obliged' to give the money to the Mayor and thereby conveyed to the jury the impression that they should acquit only if they found the accused believed she was under a legal compulsion to obey the Mayor's orders.

He submits that the first of these does not raise a question of law alone and that this Court is without jurisdiction to entertain an appeal upon it.

It is clear from the judgment of this Court in *The Queen v. Warner*[1], that where a Court of Appeal has quashed a conviction on two grounds of which one is, and the other is not, appealable to this Court, the appeal to this Court must be dismissed.

In support of his submission that the first of the two grounds summarized above does not raise a question of law alone, Mr. Martin relies on *R. v. Bateman*[2], particularly at 207 and *R. v. Curlett*[3]. Both of these judgments appear to lend considerable support to Mr. Martin's argument but neither of them is binding on us. The first is that of the Court of Criminal Appeal in England composed of Channell, Jelf and Bray, JJ. The second is a majority decision of the Court of Appeal for Alberta, Harvey C.J.A., Ewing and McGillivray JJ.A. being the majority and Clarke and Lunney JJ.A. dissenting. Both cases appear to hold that whether there has been nondirection or misdirection by the trial judge in dealing with the evidence is not a question of law alone. In the latter case Harvey C.J.A. points out that while this Court appears to have decided *Brooks v. R.*[4] as if the failure to make adequate reference to an item of importance in the evidence raised a question of law appealable to this Court, the point was not raised or discussed.

[1] [1961] S.C.R. 144, 128 C.C.C. 366, 34 C.R. 246.
[2] (1909), 2 Cr. App. R 197.
[3] (1936), 66 C.C.C. 256, 3 D.L.R. 199, 2 W.W.R. 528.
[4] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.

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Cartwright J.

There are, however, a number of cases in which this Court has entertained appeals based on the ground of the failure of the trial judge to deal adequately with the evidence in his charge to the jury. As examples, Mr. Milligan referred us not only to the *Brooks* case but also to *Azoulay v. The Queen*[1] and *Kelsey v. The Queen*[2].

The importance of the point raised by Mr. Martin is obvious; if he were clearly right it would, of course, be our duty to refuse leave, but in view of the state of the authorities we think the point should be dealt with by the Court constituted to hear an appeal rather than on an application for leave.

Assuming for the purposes of this application that both of the grounds on which the Court of Appeal proceeded raise points of law as to which this Court has jurisdiction we are all of opinion that leave ought to be granted. It is clear from the decision in *Warner's* case that the fact of our having granted leave will not prevent Mr. Martin urging his objection before the Court on the hearing of the appeal.

Leave to appeal on the question set out in the notice of motion is granted.

Application granted.

Solicitor for the applicant: W. C. Bowman, Toronto.

Solicitors for the respondent: Hughes, Laishley, Mullen & Kelly, Ottawa.

EDMOND ROBIN JR. AND LUCIEN BOVET (*Plaintiffs*) ..... APPELLANTS;

1962

*Oct. 22

AND

AARON GUTWIRTH AND OTHERS (*Defendants*) ..... RESPONDENTS.

1963

Mar. 7

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Real property—Deed of sale—Interpretation—Right to expropriation indemnity—Rights of privilege creditors.

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*PRESENT: Taschereau, Fauteux, Abbott, Martland and Judson JJ.

[1] [1952] 2 S.C.R. 495, 104 C.C.C. 97, 15 C.R. 181.

[2] [1953] 1 S.C.R. 220, 105 C.C.C. 97, 16 C.R. 119.

1963

ROBIN JR. *et al.* *v.* GUTWIRTH *et al.*

By a deed of sale, the plaintiffs sold their land and buildings to the predecessors in title of the defendants. The right to use part of the land and all the buildings as well as to remove the buildings until full payment of the purchase price was reserved to the plaintiffs. Anticipating the probable expropriation of the property by the city, clause 7 stipulated that any compensation paid for the expropriation of "ladite terre" should be remitted to the plaintiffs and applied to reduce the balance due on the purchase price. The city expropriated part of the property including the buildings and deposited the compensation into court. The plaintiffs applied to the Superior Court to have the amount paid to them as creditors secured by hypothec and privilege of bailleurs de fonds. The Court so ordered on condition that the defendants be credited for it. The plaintiffs appealed upon the ground that the defendants were not entitled to be credited with the part of the indemnity covering the value of the buildings. The appeal was dismissed and the plaintiffs appealed to this Court.

Held: The appeal should be dismissed.

Clause 7 was inserted in the deed having in mind an expropriation which was imminent, and the word "terre" as used was broad enough to include both land and buildings. That clause was not necessary to protect the plaintiff's rights as privileged creditors. It was intended to settle in advance that the defendants were to be entitled to receive credit on account of the balance of the purchase price for the full amount of the prospective indemnity.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Tellier J. Appeal dismissed.

Thomas Vien, Q.C., for the plaintiffs, appellants.

Alfred Tourigny, Q.C., and *Henri-Paul Lemay, Q.C.*, for the defendants, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—On October 14, 1958, by deed before Roch-A. Bergeron, notary, appellant sold a farm property—being part of original lot no. 481 on the Official Plan and Book of Reference of the Parish of Longue-Pointe—with the buildings thereon erected, to Federal Construction Limited and Huron Investment Corporation, predecessors in title of the respondents. The price of sale was $500,000 of which $200,000 was paid in cash, the balance of $300,000 payable on or before October 15, 1963, being secured by hypothec and privilege of bailleur de fonds.

[1] [1962] Que. Q.B. 86.

Under the terms of the said deed of sale appellants reserved the right to continue to occupy the buildings and to cultivate the land upon the following conditions:

CONDITIONS SPECIALES:

Les vendeurs se réservent le droit de continuer à habiter les bâtisses érigées sur ladite terre et de s'en servir de même qu'à cultiver ladite terre, aux conditions suivantes, savoir:

1. Les vendeurs continueront d'occuper tous les bâtiments mentionnés ci-dessus, avec une lisière de vingt-cinq pieds (25') de terrain tout autour d'iceux, ainsi que trois (3) arpents en arrière de ces bâtisses, tant et aussi longtemps que le solde du prix de vente mentionné ci-après n'aura pas été payé, de même que les intérêts;

2. Les vendeurs pourront cultiver le résidu de ladite terre tant que les acquéreurs n'en auront pas besoin pour les fins de leur exploitation.

* * *

5. Il est entendu entre les parties que les acquéreurs pourront payer le solde du prix de vente avec intérêts en aucun temps; elles devront, cependant, donner aux vendeurs un avis de six mois, par lettre recommandée, avant d'exiger de ces derniers qu'ils libèrent ladite terre, mais ces derniers auront alors le droit d'enlever à leurs frais, toutes les bâtisses et les transporter ailleurs s'ils le jugent à propos, sans indemnité de part et d'autre;

6. Dès qu'un bloc de terrain de dix arpents aura été libéré de l'hypothèque mentionnée ci-dessus et libré aux acquéreurs, le droit des vendeurs de cultiver sur ce bloc cessera;

The property sold was adjacent to the Montreal Metropolitan Boulevard, then under construction, and the deed of sale also contained the following special condition:

7. Il est à la connaissance des parties aux présentes que la terre ci-dessus vendue a front sur le Boulevard Métropolitain, traversant l'Île de Montréal, actuellement en construction, et qu'il est probable qu'une partie de ladite terre sera expropriée pour les fins dudit Boulevard Métropolitain; dans ce cas, toute somme d'argent payée aux vendeurs ou aux acquéreurs en compensation de l'expropriation de partie de ladite terre devra être remise aux vendeurs et par eux appliquée en réduction de tout solde du prix de vente alors dû.

In August 1959 a portion of the said property then owned by respondents—which included the part upon which the buildings were erected—was in fact expropriated by the Montreal Metropolitan Corporation for the extension of the Metropolitan Boulevard. Proceedings were taken before the Public Service Board of the Province of Quebec to fix the compensation payable and by a report dated July 21, 1960, deposited August 15, 1960, while the Montreal Metropolitan Corporation, the Public Service Board awarded compensation in the amount of $173,204.16.

1963

ROBIN JR. et al. v. GUTWIRTH et al.

Abbott J.

That award was homologated by a judgment of the Superior Court on September 8, 1960, and on the same date the amount awarded was deposited into Court to be paid *à qui de droit.*

On September 22, 1960, appellants filed a petition in the Superior Court asking for an order that the amount deposited in Court be paid to them as creditors secured by hypothec and privilege of bailleurs de fonds.

On October 26, 1960, judgment was rendered by Tellier J. granting the appellants' petition, the operative part of that judgment being as follows:

> DECRETE que les requérants Robin et Bovet ont droit de retirer en entier le montant déposé par la Corporation de Montréal Métropolitain, soit une somme de $173,204.16, comprenant le dépôt préliminaire effectué le 19 octobre 1959, lequel montant devra être crédité aux présents mis-en-cause pour valoir sur le prix de vente, en capital et intérêt en vertu de l'acte du 14 octobre 1958; tel paiement équivaudra à quittance par les requérants aux mis-en-cause, sur le prix de vente, mais sujet à la limitation ou à l'étendue des libérations hypothécaires conventionnelles des parties, suivant l'acte du 14 octobre 1958; DECRETE que sur paiement de la susdite somme, main-levée d'hypothèque sur l'immeuble concerné devra être donnée par et en faveur des parties susdites, mais seulement sur la partie, l'étendue et pour les valeurs mentionnées et prévues au paragraphe 4 des «Conditions Spéciales» de l'acte du 14 octobre 1958 dans l'occurrence main-levée hypothécaire jusqu'à concurrence d'une somme de $125,000 et sur les parties de l'immeuble mentionnées à la description technique et au plan préparé par Laurent C. Farand, arpenteur-géomètre, en date du 28 septembre 1960, les honoraires et les déboursés de chaque quittance seront à la charge des présents mis-en-cause; l'accomplissement de toutes ces formalités selon les termes et conditions de l'acte du 14 octobre 1958; ORDONNE au Protonotaire de cette Cour de procéder à telle distribution sans les formalités d'un jugement et selon les termes ci-dessus.

From this judgment appellants appealed to the Court of Queen's Bench[1] upon the ground that respondents were not entitled to receive credit for the indemnity to the extent that the said indemnity covered the value of the buildings expropriated. The appeal was dismissed, Badeaux J. dissenting. From that judgment appeal was taken to this Court.

The majority opinion in the Court below was delivered by Montgomery J. with whom Casey, Hyde and Taschereau JJ. concurred. I am in agreement with his reasons and conclusions and there is very little that I can usefully add to them.

[1] [1962] Que. Q.B. 86.

Appellants sold the property with all the buildings erected thereon, although reserving certain temporary rights of use and occupation, as provided in the special conditions to which I have referred. Moreover the expropriation award contained the following provision:

> L'exproprié ou ses ayants droit pourra ou pourront déménager les constructions érigées sur l'une ou l'autre des emprises ou les démolir et en conserver les matériaux pourvu que le terrain exproprié soit libéré du tout dans un délai de SIX (6) mois de la date du dépôt.

It is clear that special condition 7 was inserted in the deed of sale having in mind an expropriation which was imminent, and the word "terre" as used in the said clause is broad enough to include both land and buildings. The said condition was not necessary in order to protect appellants' rights as privileged creditors and I agree with the opinion of the majority in the Court below that it was intended to settle in advance that the purchasers were to be entitled to receive credit on account of the balance of purchase price for the full amount of the prospective indemnity.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the plaintiffs, appellants: Vien, Paré, Ferland, Barbeau & Pelletier, Montreal.

Attorneys for the defendants, respondents: Lemay, Martel, Poulin & Corbeil, Montreal.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

WILLIAM HEDLEY MACINNES ..... RESPONDENT.

1963
*May 10
May 10

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Mortgages purchased at a discount and held to maturity—Whether profits taxable income—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Income Tax Act, 1948 (Can.), c. 52, ss. 3 and 4—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4.

*PRESENT: Taschereau C.J. and Fauteux, Judson, Ritchie and Hall JJ.

1963

MINISTER OF NATIONAL REVENUE v. MACINNES

The respondent, an elderly businessman, was principally occupied as a soap manufacturer. Between 1944 and 1954 he purchased 309 mortgages at a discount from mortgages offered to him by various real estate agents. The mortgages so purchased were first mortgages but were regarded as substandard by mortgage companies; they were generally for amounts ranging from $1,500 to $3,000 and for a term of five to eight years. In the years 1946 to 1954 the respondent realized discounts on 113 of these mortgages which either matured or were paid off during that period. The discounts thus realized were assessed as income by the Minister. The Exchequer Court in dismissing an appeal from a judgment of the Tax Appeal Board held (a) that the discounts realized in the years 1946 to 1948 were not profits from a trade or business within s. 3 of the *Income War Tax Act*, and (b) that the discounts realized in the years 1949 to 1954 were not profits from a business within the meaning of that term as defined in the *Income Tax Act*. The Minister appealed to this Court.

Held: The appeal should be allowed.

It was quite impossible to distinguish this case, even on the facts, from those in *Scott v. Minister of National Revenue*, [1963] S.C.R. 223. The respondent was engaged in the highly speculative business of purchasing mortgages at a discount and holding them to maturity in order to realize the maximum amount of profit out of the transaction. The discounts realized by him were taxable income since they were profits or gains from a trade or business within the meaning of s. 3 of the *Income War Tax Act*, R.S.C. 1927, c. 97, and income from a business within the meaning of ss. 3 and 4 of the *Income Tax Act*, 1948 (Can.), c. 52, or ss. 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148.

Argue v. Minister of National Revenue, [1948] S.C.R. 467, distinguished.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], affirming with a variation a judgment of the Tax Appeal Board. Appeal allowed.

D. S. Maxwell, Q.C., and *G. Ainslie*, for the appellant.

K. Eaton and *B. Crane*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The Minister of National Revenue appeals from the judgment of the Exchequer Court[1], which held (a) that certain discounts realized in the years 1946 to 1948 on the purchase of mortgages were not profits from a trade or business within s. 3 of the *Income War Tax Act*, and (b) that similar discounts realized in the years 1949 to 1954 were not profits from a business within the meaning of that term as defined in the *Income Tax Act*. It is the unanimous opinion of the Court that these receipts were taxable under the appropriate legislation.

As we are prepared on the facts, which are not disputed, to draw inferences different from those of the learned trial judge, it is necessary to state them in brief outline.

[1] [1962] Ex. C.R. 385, [1962] C.T.C. 350, 62 D.T.C 1208.

The Minister, in making the re-assessment for the taxation years under appeal, added to the respondent's income the following amounts in respect of discounts realized by the respondent on certain mortgages and agreements for sale which he had purchased. These realized discounts were:

1946	$ 750.00
1947	968.23
1948	1,523.17
1949	711.73
1950	1,397.00
1951	5,798.11
1952	8,212.72
1953	8,703.35
1954	10,667.67
	$ 38,731.98

At the time of the hearing of the appeal, the respondent was 83 years of age. He had had a long and varied business career. He had also held two offices in the Civil Service of the Province of British Columbia, one of which was that of Official Administrator for the County of Vancouver, which he held from 1925 to 1929. In the mid-thirties he went into the business of manufacturing soap and he was carrying on that business at the time of the appeal.

In 1944 the respondent began to purchase substandard mortgages at a discount. The following table shows by years the number of mortgages purchased at a discount between 1944 and 1954, and the aggregate of the amounts owing under the terms of the mortgages at the time they were acquired by the respondent:

Year	*Number*	*Purchase Price*	*Amount Owing*
1944	3	$ 4,144.50	$ 4,860.00
1945	1	914.00	975.00
1946	23	46,577.66	51,592.02
1947	25	50,169.83	62,529.97
1948	22	49,063.70	60,743.57
1949	30	72,096.06	85,423.63
1950	31	78,922.09	96,787.38
1951	36	89,790.68	115,802.80
1952	60	170,068.41	212,590.07
1953	34	115,835.07	148,365.76
1954	44	148,394.86	212,714.51
	309	$ 825,976.86	$ 1,053,220.78 (*)

(*) The aggregate of the fourth column in the above table is, in fact, $1,052,384.71, but the respondent conceded that the figure of $1,053,220.78, arrived at by the appellant's assessors was the correct figure.

1963

MINISTER OF NATIONAL REVENUE v. MACINNES

Judson J.

Of the 309 mortgages acquired during the period between 1944 and 1954, 113 either matured or were paid off and the respondent realized discounts in the sum of $38,731.98. In addition to these 113 mortgages, three or four additional mortgages in respect of which no discounts had been taken either matured or were paid off.

At the end of the respondent's 1954 taxation year, 196 of the 309 mortgages were still current and the amount of the unrealized discounts was $171,000, and between 1954 and the date of the trial before the Exchequer Court, the bulk of the discounts in relation to these mortgages had been realized by the respondent.

Between 1954 and the date of the trial before the Exchequer Court, the respondent was still as actively engaged in obtaining further mortgages as he had been in the earlier years.

All of the mortgages which had been acquired at a discount were first mortgages but were regarded as substandard, since in most cases the principal amount secured represented up to two-thirds of the value of the property, instead of 45 per cent of the sale value which, according to the respondent's evidence, was the amount normally secured under a conventional first mortgage. It was the respondent's view that to the extent that the principal amount exceeded 45 per cent of the value of the property mortgaged, there was a "second morgage factor" or a risk similar to that attaching to a second mortgage. All of the 309 mortgages acquired by the respondent were mortgages on which the principal repayable was in excess of 50 per cent of the value of the property mortgaged.

The sources of the funds with which the respondent acquired these mortgages were the profits from the soap business, the sale in the late forties and fifties of certain assets owned by him in Eastern Canada and the payments being received by him on the existing mortgages.

Most of the mortgages acquired by the respondent were mortgages on small old-fashioned houses with fir floors and old-fashioned plumbing, located in South Vancouver and Burnaby. The mortgages were generally for amounts ranging from $1,500 to $3,000 and for a term of five to eight years. They bore the current rate of interest payable on

first mortgages, and provided for monthly payments of between $30 to $45 per month on account of interest and principal.

Generally, the respondent, before acquiring a mortgage, would insist on the purchaser-mortgagor having an equity in the property equivalent to one-third of its value and would acquire these mortgages at a discount of 15 per cent.

The mortgages in question were all selected by the respondent from those offered to him by various real estate agents in whom he had reasonable confidence and who were constantly canvassing him to acquire these mortgages. Originally, the respondent purchased most of the mortgages from two real estate firms, but as time went on he dealt with up to ten or twelve real estate firms. Persons acting for vendors in the sale of property knew that the respondent was a person interested in purchasing substandard mortgages. The respondent never bargained over the amount of the discount; he either accepted or rejected the offer made by the real estate agent.

During the years in question, the respondent was principally occupied in carrying on his business as a soap manufacturer. However, he gave evidence to the effect that at all relevant times, the interest and discounts realized from the mortgages were as great as his profits from the soap business.

The learned trial judge found:

> . . . In my view there is nothing in the case which characterizes what the respondnet did as anything but mere investment of funds which he had available for investment.
>
> . . . it would I think be unrealistic to look upon what he did as a course of conduct or scheme directed primarily to the making of profit by realizing such discounts. The interest return was of greater importance and the most that could be said on this score is that his object was to get both . . . .
>
> . . . That these mortgages as a class were in fact good securities is demonstrated by the result and though each involved some risk and at that possibly a somewhat greater risk than the types in which the mortgage companies were interested, I see nothing so unusual about them as to suggest that the respondent chose them in the course of a gamble or adventure looking to the realization of a speculative profit.

In our opinion there was error in the judgment of the learned trial judge in failing to find on the evidence which I have outlined that the respondent had engaged in the highly speculative business of purchasing mortgages at a discount and holding them to maturity in order to realize

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Judson J.

the maximum amount of profit out of the transaction, and in failing to find that the discounts realized were taxable income since they were profits or gains from a trade or business within the meaning of s. 3 of the *Income War Tax Act*, R.S.C. 1927, c. 97, and income from a business within the meaning of ss. 3 and 4 of the *Income Tax Act*, 1948 (Can.), c. 52, or ss. 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148.

It is quite impossible to distinguish this case, even on the facts, from those in *Scott v. Minister of National Revenue*[1]. We are also of the opinion that *Argue v. Minister of National Revenue*[2] is in no way relevant to the issues raised in the present appeal. The problem in *Argue* was whether what was admittedly interest earned on long-term real estate mortgages and agreements could be regarded as income derived from the carrying on of a money-lending business for the purposes of the *Excess Profits Tax Act*, 1940 (Can.), c. 32. There was no evidence in *Argue* that the mortgages acquired were risky securities and there was no issue raised concerning either discounts or bonuses. The Court was concerned exclusively with money paid to Argue as interest. The Court simply held that there was no evidence which would justify the finding that Argue was carrying on business as a money-lender—no evidence which would serve to convert what was admittedly interest received from securities into profits from a business.

The appeal should be allowed and the judgment of the Exchequer Court reversed with costs and the re-assessments referred back to the Minister in order to adjust the amount of the discounts realized and included in the respondent's income in accordance with the table of discounts set out above and totalling $38,731.98, counsel having agreed upon these amounts.

Appeal allowed with costs.

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitors for the respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

[1] [1963] S.C.R. 223, [1963] C.T.C. 176, 63 D.T.C. 1121.
[2] [1948] S.C.R. 467, [1948] C.T.C. 235, 4 D.L.R. 161.

MARY HELEN ELLIOTT and CANADA PERMANENT TORONTO GENERAL TRUST COMPANY, Executors of the last will and testament of George Andrew Elliott, deceased, (*Applicants*) ..APPELLANTS;

1963

*Mar. 26
May 1

AND

JAMES L. WEDLAKE (*Respondent*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Partnership agreement—Annual payments by one partner in reduction of capital account of other partner—Essentials of an agreement for sale lacking—Dissolution of partnership—Distribution of Assets—The Partnerships Act, R.S.O. 1960, c. 288, s. 44.

The respondent and E who carried on business together, in partnership, as hardware merchants, entered into an agreement which terminated that partnership and was intended to form a limited partnership for the continued operation of their business. It was provided in the agreement that E would contribute $90,000 to the capital of the partnership, that the respondent would pay interest on this amount, or on such capital of E as remained in the partnership from time to time, and that the respondent would also make annual payments towards the purchase of E's share. It was further provided that in the event of E's death his personal representatives would continue the partnership. E died in 1955 and the partnership was continued by his executors (the appellants) and the respondent until 1961, when an agreement was made between the respondent and the appellants for the dissolution of the partnership and liquidation of the partnership assets by the respondent. After satisfying all outstanding liabilities, there remained on hand the sum of $36,608.99.

The appellants applied to the Court for a judgment declaring their rights in connection with this sum and also the liability of the respondent to the appellants. Their contention was that, under the terms of the agreement, the respondent had agreed to purchase from E his interest in the partnership for $90,000 of which $53,000 still remained unpaid. They claimed, therefore, that they were entitled to all the moneys realized from the partnership assets and also a personal judgment against the respondent for the amount of the difference between that amount and $53,000. Judgment on the motion was given in favour of the appellants but, on appeal, this decision was reversed. An appeal was then brought to this Court.

Held: The appeal should be dismissed.

The partnership agreement lacked the essential ingredients of an agreement for sale. The essential purpose of the agreement was to provide for a partnership, for the terms governing the partnership relation and the operation of the partnership. It provided for the gradual reduction by the respondent of the capital account to E's credit during the continuance of the partnership. There was no outright covenant by the respondent, without any reservation or limitation, to buy E's capital interest. The respondent did no more than to undertake, while the partnership lasted, to make limited annual payments in reduction of E's capital account.

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Judson JJ.

1963

ELLIOTT AND CANADA PERMANENT TORONTO GENERAL TRUST CO. v. WEDLAKE

The agreement was completely silent as to the distribution of assets on dissolution and, that being so, the statutory rules governed. The appellants were entitled to no more than a proportionate interest in the distribution of assets and the proportions were to be determined in accordance with the respective capital interests of the appellants and the respondent as of the date of the dissolution of the partnership.

APPEAL from a judgment of the Court of Appeal for Ontario, reversing a judgment of Smily J. upon an application for a declaration of the rights of the parties under an agreement of partnership. Appeal dismissed.

Honourable R. L. Kellock, Q.C., for the applicants, appellants.

G. D. Finlayson, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent and George Andrew Elliott carried on business together, in partnership, as hardware merchants, at the City of Brantford, under the terms of a partnership agreement dated October 1, 1937, until June 30, 1954. That partnership was terminated on the latter date by an agreement between them dated June 21, 1954 (hereinafter referred to as "the agreement"), the relevant portions of which provided as follows:

WHEREAS the Parties hereto have been carrying on business as hardware merchants at the City of Brantford under the name of Elliott Wedlake under the terms of an agreement of partnership dated October 1st, 1937,

AND WHEREAS the Parties hereto have agreed to terminate and dissolve the said partnership and to enter into a Limited Partnership under the provisions of the Limited Partnership Act, R.S.O. Chap. 208 on the terms and conditions hereinafter set out,

AND WHEREAS it is the intention of the parties hereto that the Party of the Second Part shall purchase the interest of the Party of the First Part in the said Limited Partnership in accordance with the terms hereinafter set forth in this agreement,

NOW THIS AGREEMENT WITNESSETH that the Parties hereto covenant and agree with each other as follows:

1. The general partnership heretofore carried on by the Parties hereto at the City of Brantford under the name of Elliott Wedlake shall be terminated on June 30th, 1954.

2. The Party of the Second Part on or before said date will pay to the Party of the First Part the sum of Twelve Thousand and Forty three Dollars and Thirteen Cents ($12,043.13), less any drawings of the Party of the First Part since the 31st of May, 1954, being the amount to the credit of the capital account of the Party of the First Part in said business in excess of $90,000 and for the amount of the value of good will and por-

tion of depreciation on fixed assets of said business agreed upon by the Parties, less drawings on account by the Party of the First Part during 1954, . . .

* * *

4. The Party of the First Part is to contribute the sum of $90,000 to the capital of the partnership as a limited partner under the provisions of the Limited Partnership Act, R.S.O. Chap. 208, and a new limited partnership to be known as Elliott Wedlake is to be formed as of the date July 1st, 1954 under the terms and conditions herein set out.

5. The limited partnership shall continue from year to year during the lifetime of the Party of the First Part, and continue thereafter subject to the conditions hereinafter contained.

6. Interest at 5% is to be paid to the Party of the First Part on said sum of $90,000 or on such capital of the Party of the First Part as may remain in the partnership from time to time, payable quarterly or as may be required, and the Party of the Second Part is also to pay the sum of Two Thousand Dollars ($2,000) on account of the purchase of the share of the Party of the First Part each year during the remainder of the lifetime of the Party of the First Part, such payments to be made on the 31st day of January in each year commencing January 31st, 1955.

7. In the event of the death of the Party of the First Part during the continuance of the partnership, the personal representatives of the Party of the First Part shall continue the partnership as limited partners on the same terms and conditions as are herein contained excepting that the Party of the Second Part shall be entitled to increase the annual payment on account of the purchase of the share of the Party of the First Part to any amount desired by him on giving the personal representatives of the Party of the First Part two (2) months' notice in writing of the amount intended to be paid by him.

8. The lease of the premises 193 Colborne Street made by the Party of the First Part to Elliott Wedlake dated the 22nd day of November, 1949, is assigned to the Limited Partnership and the Party of the First Part consents thereto and is to be amended as follows:

The Lessee is to pay one half the total municipal taxes chargeable against the said premises and the land therewith and one half of all local improvements for the remainder of the term reserved by said lease, including the whole of the year 1954.

The Party of the Second Part is to pay two per cent (2%) per annum on $90,000 or on such amount as the Party of the First Part may have invested in said partnership as of the 1st day of February in each year from time to time in addition to the interest at five per cent (5%) per annum provided by the Limited Partnership Act, such additional interest to be charged by the Party of the Second Part as rent for accounting purposes, the intention being that the Party of the First Part shall receive seven per cent (7%) on capital invested in said partnership.

9. It is agreed between the Parties hereto that the Party of the First Part shall not be entitled to any profits arising from the operation of the said business with the exception of the payments herein set forth of interest at 5% on the invested capital of the Party of the First Part and 2% increase of rent calculated on invested capital of the Party of the First Part.

Although the agreement contemplated a limited partnership, with Elliott as a limited partner, it is conceded by counsel for both parties that this was not accomplished, as

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ELLIOTT AND CANADA PERMANENT TORONTO GENERAL TRUST CO. v. WEDLAKE

Martland J.

there was no contribution of an actual cash payment by Elliott to the common stock, as required by s. 2 of *The Limited Partnerships Act*, R.S.O. 1950, c. 208. However, it is also similarly conceded that this does not in any way affect the outcome of these proceedings, since all creditors of the partnership were paid off in full.

Elliott died on August 6, 1955, and the appellants are the executors of his last will and testament. The partnership was continued by the appellants and the respondent, as provided for in clause 7 of the agreement. The respondent made payments to the appellants in accordance with the agreement, including payments pursuant to clauses 6 and 7 of the agreement. As a result of the payments made by the respondent pursuant to those two clauses, both before and after Elliott's death, Elliott's contribution to the capital of the partnership, which had been defined in the agreement at $90,000, had been reduced, as of January 31, 1961, to $58,000. Subsequent to that date and prior to the time these proceedings were commenced, a further $5,000 payment was made by the respondent, reducing this amount to $53,000.

Losses occurred in the operation of the partnership business. These were absorbed by the respondent, whose capital interest in the partnership was correspondingly reduced from time to time in the amount of the losses. Thus, whereas as of June 11, 1959, the respondent's capital interest was $60,292.24, this had been reduced by January 31, 1961, to $39,208.78.

On May 25, 1961, an agreement was made between the respondent and the appellants for the dissolution of the partnership and for liquidation of the partnership assets by the respondent. After satisfying all outstanding liabilities, there remained on hand the sum of $36,608.99.

The appellants applied to the Court on November 22, 1961, for a judgment declaring their rights in connection with this sum and also the liability of the respondent to the appellants. Their contention was that, under the terms of the agreement, the respondent had agreed to purchase from Elliott his interest in the partnership for $90,000, of which $53,000 still remained unpaid. They claimed, therefore, that they were entitled to all the moneys realized from the partnership assets and also a personal judgment against the respondent for the amount of the difference between that amount and $53,000.

The respondent's contention was that the proceeds of the realization of the partnership assets should be divided between the appellants and himself in proportion to the standings of their respective capital accounts as of the date of dissolution.

Judgment on the motion was given in favour of the appellants but, on appeal, the Court of Appeal unanimously reversed this decision and held in favour of the respondent. From that judgment the present appeal is brought.

Before this Court it was submitted, on behalf of the appellants, that the effect of clauses 6 and 7 of the agreement, coupled with the third recital clause, was to constitute a binding agreement by the respondent with Elliott to purchase the latter's interest in the partnership for $90,000, of which there still remained owing a sum of $53,000.

With respect to the effect of clauses 6 and 7 of the agreement, Kelly J.A., who delivered the judgment of the Court of Appeal, held as follows:

> Considered by themselves, clauses 6 and 7, in my opinion, lack the essential ingredients of an agreement for sale; there is no mutual undertaking to buy on the one hand and to sell on the other; there is no purchase price stated or capable of being determined by any means specified in the agreement; there is no obligation on the part of Wedlake to pay anything beyond the sum of $2,000 a year during the lifetime of Elliott. In my view, unless the operative parts of the agreement can be bolstered up by the words of the third recital, the agreement fails completely to be an effective agreement of sale of which the Elliott executors can enforce performance.

He then went on to consider whether this result was altered by the wording of the third recital clause and, after referring to various authorities dealing with the effect of a recital clause upon the interpretation of an agreement, he concluded as follows:

> Clauses 6 and 7 are not ambiguous in the sense that they are capable of alternative constructions to choose between which the Court may be assisted by reference to the recitals. Clauses 6 and 7 are vague in the sense that by themselves they do not support a construction which would lead to establish an enforceable contract of purchase or sale. Resort to the recitals may not be had to clear up the vagueness and to incorporate words which it would be necessary to insert in order that those clauses expressed the agreement of sale and purchase sought to be found in them by the Elliott executors.

I have reached the same conclusion as the Court of Appeal, for the following reasons. I agree entirely that clauses 6 and 7 do not spell out the essential ingredients of

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ELLIOTT AND CANADA PERMANENT TORONTO GENERAL TRUST CO. v. WEDLAKE

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an agreement for sale whereby the respondent undertook, without reservation, to purchase Elliott's interest in the partnership for $90,000. The essential purpose of the agreement was to provide for a partnership, for the terms governing the partnership relation and the operation of the partnership. The effect of clauses 6 and 7, even when read in conjunction with the recital clause, which, it must be remembered, referred only to "the intention" of the parties that the respondent should purchase Elliott's interest "in accordance with the terms hereinafter set forth in this agreement", was to make provision for the gradual reduction by the respondent of the capital account to Elliott's credit during the continuance of the partnership. There is no outright covenant by the respondent, without any reservation or limitation, to buy Elliott's capital interest. The respondent did no more than to undertake, while the partnership lasted, to make limited annual payments in reduction of Elliott's capital account.

The appellants are seeking to claim a preference on dissolution for the full return of Elliott's capital and I find nothing in the agreement which so provides. It is completely silent as to the distribution of assets on dissolution and, that being so, the statutory rules must govern and the division should be made in the manner directed by the Court of Appeal.

The appellants also submitted that, even if there were no firm agreement by the respondent to purchase Elliott's interest, that the appellants had a lien on the partnership assets to the extent of the appellants' interest at the date of dissolution. This argument was based upon the proposition that under the terms of the agreement the respondent was obligated to assume all losses incurred by the partnership; that as the proceeds of realization of the partnership assets were insufficient to pay off the remaining portion of the appellants' capital interest, there had obviously been a capital loss and, consequently, for the amount of this loss the respondent was responsible to the appellants out of what otherwise would have been his share of the proceeds of the sale of the partnership assets.

I do not find anything in the agreement to justify this contention. The agreement does not, in terms, even obligate the respondent to assume operating losses. Clause 9 provided merely that Elliott should not be entitled to any

profits from the operation of the business other than the 5 per cent per annum on his invested capital and the rent in respect of the business premises calculated at 2 per cent on his invested capital. It may be implied from this provision that the respondent agreed to assume operating losses and this, in fact, he did. His own capital interest was reduced from time to time by the amount of the operating losses sustained by the business and, in consequence, the extent of his proportionate participation in the distribution of the partnership assets on dissolution was reduced. There is, however, no covenant on his part that, upon a dissolution of the partnership, the apellants should be entitled to be fully reimbursed for all moneys invested in the partnership by Elliott in priority to any participation therein by himself.

The appellants relied upon a statement of the law found in Lindley on Partnership, 12 ed., p. 383, reading as follows:

> In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm.

This proposition does not assist the appellants. The debts of the partnership were all paid off. There were no outstanding advances by Elliott to the partnership. There is no evidence that he made any such advances. What he did was to make a contribution to the capital of the partnership. There were no debts owing by the partnership to the appellants or by the respondent to the partnership. That being so, in the absence of any provision in the agreement to the contrary (and there is none), the appellants are entitled to no more than a proportionate interest in the distribution of the partnership assets, the proportions to be determined in accordance with the respective capital interests of the appellants and the respondent as of the date of the dissolution of the partnership.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the applicants, appellants: Read & Innes, Brantford.

Solicitors for the respondents: McCarthy & McCarthy, Toronto.

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*Mar. 1
June 24

CAMILLE THIBAULT (*Defendant*) .....APPELLANT;

AND

THE CENTRAL TRUST COMPANY OF CANADA, Trustee of the estate of Thibault Auto Limited, in Bankruptcy (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Companies—Mortgage executed by company as security for payment of its shares by officer of the company—Statutory prohibition—Mortgage void—Covenant as to payment of taxes on land described in mortgage also void.

The defendant agreed to sell his garage and automobile sales business to one C for a certain sum secured by a mortgage. For the purpose of obtaining tax advantages the parties were advised that instead of making the sale direct to C, a company should be incorporated and the property transferred to it. This arrangement was followed and the defendant received the preferred shares of the company in exchange for his business. It was agreed that C would purchase these shares. The defendant and other members of the company's board of directors subsequently resigned and were replaced by a new board with C as president. After the new directors had assumed office the company executed a mortgage to the defendant to secure payment by C of the purchase price of the shares. The company later went into bankruptcy and the trustee sought to have the mortgage set aside on the grounds that it was *ultra vires* of the company, having been given in contravention of s. 37(1) of the *Companies Act*, R.S.N.B. 1952, c. 33. The trial judgment, which held that the mortgage should be wholly sustained, was reversed by the Court of Appeal. On appeal to this Court the defendant contended that even if he failed on the main issue, there had been error in the Court below in declaring the mortgage void in so far as it secured the defendant for taxes imposed upon the land described in the mortgage, which he had paid.

Held: The appeal should be dismissed.

For the reasons given by Ritchie J.A. in the Court below, the covenant for payment of the entire principal amount was invalid. If the mortgage was invalid as to the principal amount secured, then the covenant in respect to taxes could not come into operation at all, because there was then no obligation resting upon the mortgagor company toward the defendant to pay taxes upon the property described in the mortgage, and, unless there was such an obligation, the defendant was not enabled, by paying the taxes owed by the company, to obtain security upon its property for the amount which he had paid.

Northern Electric and Manufacturing Co. Ltd. v. Cordova Mines Ltd., (1914), 31 O.L.R. 221; *Re Johnston Foreign Patents Co. Ltd.*, [1904] 2 Ch. 234, distinguished.

*PRESENT: Taschereau, Cartwright, Abbott, Martland and Ritchie JJ.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], reversing a judgment of West J. Appeal dismissed.

C. J. A. Hughes, Q.C., for the defendant, appellant.

E. J. Mockler, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—In my opinion, for the reasons given by Ritchie J.A., who delivered the unanimous judgment of the Appeal Division of the Supreme Court of New Brunswick[1], this appeal should be dismissed.

The only point on which further comment is required is with respect to the appellant's contention that, even if he failed on the main issue, there had been error in the Court below in declaring the mortgage void in so far as it secured the appellant for taxes imposed upon the land described in the mortgage which he had paid in 1957, amounting to $3,940.

The appellant relied upon that clause in the mortgage whereby Thibault Auto, Limited covenanted with the appellant that it would pay all taxes imposed upon the mortgaged premises and which further provided that, in the event of the failure of that company to pay the same, it would be lawful for the appellant to pay them and to add the amount to the principal sum secured by the mortgage as a further charge upon the mortgaged premises. It was urged that, even if the mortgage were invalid in relation to the principal sum which it purported to secure, it could yet be upheld in respect of this covenant.

The cases cited by the appellant, *Northern Electric and Manufacturing Co. Limited v. Cordova Mines Limited*[2] (reversed on other grounds under the title *Hughes v. Northern Electric and Manufacturing Co.*[3]), and *Re Johnston Foreign Patents Company Limited*[4], do not support his contention. In the former case, the Court of Appeal of Ontario held that a mortgage given by a company could be upheld to the extent of the amount due to the mortgagees as advances to the company, even though it was *ultra vires* of

[1] (1962), 33 D.L.R. (2d) 317.
[2] (1914), 31 O.L.R. 221.
[3] (1914), 50 S.C.R. 626, 21 D.L.R. 358.
[4] [1904] 2 Ch. 234, 73 L.J. Ch. 617.

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the company in so far as it was given to secure payment of purchase moneys for its shares being purchased by a third person from a shareholder. In the latter case, each of three companies had become parties to joint debentures binding them jointly and severally. It was *ultra vires* of each company to charge its assets for funds advanced to another company. It was held that, to the extent to which the moneys advanced had come into the hands of each company, the debentures were a valid charge upon the assets of that particular company. It will be observed that in neither of these cases was the mortgage security entirely invalid. In each case the mortgage was valid with respect to a certain part of the principal sum secured by it, even though invalid with respect to the remaining portion of it.

In the present case, however, the covenant for payment of the entire principal amount was invalid. The covenant upon which the appellant relies in this case is by way of additional security to the main covenant to pay, and is subordinate to it. The main covenant has been found to be completely invalid. If the mortgage is invalid as to the principal amount secured, then the covenant in question could not come into operation at all, because there was then no obligation resting upon the mortgagor company toward the appellant to pay taxes upon the property described in the mortgage, and, unless there was such an obligation, the appellant was not enabled, by paying the taxes owed by the company, to obtain security upon its property for the amount which he had paid.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: J.-M. Michaud, Edmundston.

Solicitors for the plaintiff, respondent: Hanson, Rouse, Gilbert & Mockler, Fredericton.

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CAINE FUR FARMS LIMITED and JOHN T. CAINE (*Defendants*) — APPELLANTS; *Jan. 25 **June 10

AND

JOHN KOKOLSKY, carrying on business as Capitol Mink Farm, (*Plaintiff*) ..... — RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Animals—Defendant farmer allowing dog to run at large during whelping season—Dog straying on to neighbouring farm and entering mink compound—Resulting loss of mink—Negligence—Liability of defendant—The Game Act, R.S.A. 1955, c. 126, s. 44—By-law No. 205 of The Municipal District of Strathcona.

The plaintiff and the defendants were mink farm operators whose respective farms were situated close together. Both operations were enclosed by substantial wire fences. During the whelping season (a time when female mink are easily agitated and if thus upset have a proclivity to destroy their young), the defendants' dog, by climbing or leaping over the plaintiff's fence, got into the compound and when found was on top of the mink cages. The mink were in a state of panic as a result of which 67 kits and two adult mink were killed. The dog had been allowed to roam at large in contravention of a municipal by-law and s. 44 of *The Game Act*, R.S.A. 1955, c. 126. The trial judge found that there was negligence on the part of the defendants and awarded damages to the plaintiff. This judgment was sustained by the Court of Appeal; by leave, an appeal was brought to this Court.

There was no evidence that the defendants had any knowledge or suspicion that their dog had any propensity to disturb mink or the inclination or ability to leap over a high wire fence. Relying on the law relating to the liability of the owner of a domestic animal for damage done by a domestic animal while at large, defendants' counsel argued that liability could not be found against the defendants in the absence of *scienter*.

Held: The appeal should be dismissed.

Per Abbott, Martland and Ritchie JJ.: In the light of the circumstances of this case, there was a duty of care imposed upon the defendants to take reasonable steps to prevent their dog from straying on to the plaintiff's premises. There was sufficient evidence to warrant the conclusion reached by both of the Courts below that, in the light of all the circumstances, there was negligence on the part of the defendants.

Fardon v. Harcourt-Rivington (1932), 146 L.T. 391; *Fleming v. Atkinson*, [1959] S.C.R. 513, referred to. *Buckle v. Holmes*, [1926] 2 K.B. 125; *Tallents v. Bell & Goddard*, [1944] 2 All E.R. 474; *Toogood v. Wright*, [1940] 2 All E.R. 306, distinguished.

*PRESENT: Kerwin C.J. and Abbott, Martland, Ritchie and Hall JJ.
**Kerwin C.J. died before the delivery of judgment.

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CAINE FUR FARMS LTD. *et al.* *v.* KOKOLSKY

Per Abbott, Ritchie and Hall JJ.: The defendants were entitled to succeed unless there were present in this case circumstances which were special in the sense that they created a duty on the part of the defendants toward the plaintiff and that there had been a breach of that duty. To allow this dog which was strange to plaintiff's mink to run at large in this area in the whelping season with knowledge that there is a hostile reaction between mink and strange dogs was negligence. The defendants owed a duty to the plaintiff not to frighten the female mink at that particular time and were in breach of that duty in allowing the dog to run at large. Recognition of such a duty was implied in ss. 44, 112(*b*) and 121 of *The Game Act,* R.S.A. 1955, c. 126, and By-law No. 205 of the Municipal District of Strathcona.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from a judgment of Milvain J. Appeal dismissed.

A. O. Ackroyd and *A. R. Thompson,* for the defendants, appellants.

J. W. McClung and *J. T. Joyce,* for the plaintiffs, respondents.

The judgment of Abbott, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—The facts of this case have been fully stated in the reasons of my brother Hall, with which I agree.

The case involves the question of liability for damage caused by a dog. At common law the dog has been placed in a favoured position, as compared with that of most of the other domestic animals. Like them, the dog did not involve its owner under the strict liability imposed in respect of the keeping of dangerous animals. Liability in respect of a dog, under that strict rule, would only arise if *scienter* were proved. But, in addition to this, the dog was not an animal whose trespass would involve its owner under the strict liability imposed for cattle trespass.

The latter proposition is established in *Buckle v. Holmes*[2], which, although it involved the owner of a cat, stated the law respecting dogs and applied the same rule also to cats. The reason for the special position of the dog was stated by Bankes L.J., at p. 129, as follows:

> Trespass by a dog is very different; a dog following its natural propensity to stray is not likely to do substantial damage in ordinary circumstances. although it might do so by rushing about in a carefully tended

[1] (1962), 37 W.W.R. 123, 31 D.L.R. (2d) 556.

[2] [1926] 2 K.B. 125.

garden; but those who administered the law in the course of its development had regard not to exceptional instances but to the ordinary experience of a dog's habits, and they also took into account that the dog, a useful domestic animal, must be used if at all according to its nature; that it cannot ordinarily be kept shut up, and that the general interest of the country demands that dogs should be kept and that a reasonable amount of liberty should be allowed them. Therefore dogs are placed by the common law in a class of animals which do not by their trespasses render their owners liable.

It may be noted at the outset that the Municipal District of Strathcona No. 83, within the area of which the damage in question here occurred, did not share this kindly attitude toward the position of the dog, for it had enacted, on February 9, 1953, Bylaw No. 205, which provided, in part, as follows:

1. For the purpose of this bylaw, the term "running at large" shall refer to any dog not under the immediate and effective control of its owner whether on the premises of its owner or otherwise.

2. No person shall, after the passing of this bylaw, suffer or permit any dog of which he is the owner to run at large within the Municipal District.

The liability of a dog owner for damage caused by his dog did not necessarily have to be founded on the rule of strict liability relating to the keeping of dangerous animals. It might be established in negligence if, in the circumstances, a duty to take care in relation to the dog existed and there had been a breach of it. This proposition was recognized by the House of Lords in *Fardon v. Harcourt-Rivington*[1], and it is stated by Lord Atkin in that case, at p. 392, as follows:

But it is also true that, quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour—the ordinary duty to take care in the cases put upon negligence.

It should also be noted that in this Court, in the case of *Fleming v. Atkinson*[2], Judson J., who delivered the reasons of three out of the five majority judges in that case, applied the ordinary rules of negligence in a case involving the straying of cattle on to a highway.

In my opinion, the question in issue here is as to whether or not the respondent is entitled to succeed against the appellants on a claim under the ordinary rules of negligence.

[1] (1932), 146 L.T. 391. [2] [1959] S.C.R. 513, 18 D.L.R. (2d) 81.

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Was there a duty on the part of the appellants, in the circumstances of this case, to take reasonable care that their dog would not be free to stray on to the respondent's premises, thereby involving the likelihood of injury to his mink? Both of the Courts below have held that there was such a duty and that the appellants were in breach of it.

In the first place, it should be noted that the appellants did not have a right to let their dog run at large. This was expressly forbidden by the provisions of the bylaw previously quoted. Counsel for the respondent relied upon that bylaw and also upon s. 44 of *The Game Act*, R.S.A. 1955, c. 126, as establishing a statutory duty, the breach of which gave to the respondent a cause of action. Section 44 of *The Game Act* provides:

> 44. No person having the custody or control of a retriever dog, setter dog or pointer dog or any other dog used for the hunting of game birds shall allow any such dog to run at large at any time between the first day of May and the first day of August in any year, unless he is expressly authorized to do so by this Act or the regulations.

I do not find it necessary to determine whether or not an absolute statutory liability was imposed upon the appellants by either or both of these provisions, so as to entitle the respondent, on establishing a breach thereof and damage to himself, to succeed in a claim for damages. Put at their lowest, however, these provisions are of significance in establishing that the appellants did not have any legal right to permit their dog to run at large. It seems to me that they serve as a complete answer to the contention made by the appellants, based on the English decisions of *Buckle v. Holmes, supra, Tallents v. Bell and Goddard*[1], and *Toogood v. Wright*[2], that a dog owner is not to be found liable in negligence because he suffers his dog to be at large, knowing of the natural propensities of dogs and that harm may possibly result when these propensities are manifested. In none of these cases did there exist a statutory provision which forbade the dog owner from permitting his animal to run at large.

In addition to the statutory provisions, however there are also, in this case, the following circumstances:

1. The appellants were aware of the existence of the respondent's mink farm adjacent to their own premises.

[1] [1944] 2 All E.R. 474. [2] [1940] 2 All E.R. 306.

2. They were aware that their dog had been accustomed to frequent the area near the respondent's land.

3. They should have known that the presence of a strange dog in the respondent's mink enclosure during the whelping season would terrify the whelping females who, in such circumstances, have a proclivity to destroy their young.

4. The appellants took no precautions to confine or restrain the dog during the whelping season.

In the light of all these circumstances, in my opinion, there did exist a duty of care imposed upon the appellants to take reasonable steps to prevent their dog from straying on to the respondent's premises. Both of the Courts below have found that there was negligence on the part of the appellants in the light of all the circumstances and, in my opinion, there was sufficient evidence to warrant that conclusion being reached.

I am, therefore, of the opinion that this appeal should be dismissed with costs.

The judgment of Abbott, Ritchie and Hall JJ. was delivered by

HALL J.:—For some 17 years prior to May 15, 1959, both parties to this action carried on the business of mink farming in the Municipal District of Strathcona immediately adjacent to the south boundary of the City of Edmonton. The two mink farms were close together, being separated only by an extension of 109th Street at one point and being contiguous at another point. Both operations were enclosed by substantial wire fences, the Caine fence being about 4-5 feet in height and the Kokolsky fence being 6 feet.

In 1958 the appellant Caine had acquired a Chesapeake retriever, a young dog, which by May 1959 had grown to full size and was described in the evidence as a large Chesapeake retriever which had received training as a mink dog and was used as such by the employees of Caine Fur Farms Limited. It had also been trained as a bird dog. The dog was normaly kept within the mink compounds or enclosure of the Caine farm and permitted to roam amongst the mink pens. The dog was also allowed to roam at large and to leave the mink farm area. The evidence also established that the dog was free to roam in the wooded area adjacent

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Hall J.

to these mink farms and that the dog went into the wooded area, and, on occasion, put up pheasants and perhaps other birds and game there.

This period of the year is known in the mink farming business as the whelping season. Both the respondent and Mr. Caine and the Caine Fur Farms Limited foreman, Mr. Phillips, knew that whelping was in progress on the respondent's mink farm. It was established that during the whelping season the female mink are easily agitated and that a strange dog in a mink compound was likely to upset the female mink and cause them to destroy their young. The dog had not shown any propensity or inclination to behave in an unusual or aggressive manner toward mink nor had he shown any inclination to leap over high fences.

On the evening of May 15, 1959, the respondent found this Chesapeake retriever in his mink compound. The learned trial judge found that the dog got into the compound by leaping or climbing over the fence which surrounded the compound. The dog was on top of the mink cages or runs. The respondent went to the Caine mink ranch and returned with the foreman Phillips who led the dog away. When the respondent first saw the dog in the compound, the mink were in a state of panic and some had kits in their mouths. Four pens were upset and the nest boxes from these pens were a considerable distance away. Early the next morning the respondent checked and found 67 dead kits and two dead adult mink. Two other adult female mink were missing and never found.

The respondent brought action in the Supreme Court of Alberta for damages. The action was tried by Milvain J. who gave judgment for the respondent in the sum of $3,726 and costs. The appellants appealed to the Appellate Division of the Supreme Court of Alberta and the Court of Appeal[1] sustained the judgment of Milvain J. An appeal was then taken to this Court by leave granted May 7, 1962.

Milvain J. found both the appellant John T. Caine and Caine Fur Farms Limited negligent, and his judgment on that branch of the case reads in part as follows:

> Now, in my view there was negligence on the part of the defendants and I say so for these reasons. In the first place, the defendants were in the mink raising business, as was the plaintiff, and therefore fully aware of the danger of dogs or anything else disturbing female mink during the

[1] (1962), 37 W.W.R. 123, 31 D.L.R. (2d) 556.

whelping season. They are also all aware of the law as laid down in The Game Act . . . that a mink owner finding a dog in his mink enclosure disturbing his mink is authorized by the statute to shoot the dog forthwith, which is an indication of how serious the invasion of a dog—a strange dog—into the mink enclosure is regarded by the mink industry and by the governmental authorities that control it; and with that knowledge, and with the knowledge that any person must have of a proclivity of a healthy, intelligent dog to roam when at large, and that while roaming he might very easily upset the female mink in nearby premises, and that it was negligent not to take precautions to keep the dog restrained, at least during the whelping season.

Kane J.A. who wrote the judgment of the Court of Appeal also held that the appellants were guilty of negligence. He said, in part:

A reasonable man in the position of the defendants knowing, as the defendants did, that the plaintiff's ranch was situate across the road from the defendant company's ranch, and that during the whelping season female mink have a well-known proclivity to destroy their young, would have foreseen the damage which might result from allowing the dog to run at large on May 15th, 1959. Their failure to do so constituted a breach of duty owing by them to the plaintiff. In the circumstances, therefore, the defendants were negligent.

Both the learned trial judge, Milvain J., and Kane J.A. in the Court of Appeal, referred to the provisions of *The Game Act* of Alberta, R.S.A. 1955, c. 126, and to By-law No. 205 of the Municipal District of Strathcona. The relevant sections of *The Game Act* read:

44. No person having the custody or control of a retriever dog, setter dog or pointer dog or any other dog used for the hunting of game birds shall allow any such dog to run at large at any time between the first day of May and the first day of August in any year, unless he is expressly authorized to do so by this Act or the regulations.

* * *

112. No person shall operate a fur farm except where

* * *

(*b*) the fur-bearing animals at the farm are kept in pens and such pens are enclosed by a fence that will adequately prevent all other animals from having access thereto.

* * *

121. An owner or caretaker of fur-bearing animals kept on a fur farm for any purpose pursuant to a licence or permit obtained under this Act may kill any dog found on the premises near the enclosure in which the fur-bearing animals are kept if the dog is terrifying the fur-bearing animals by giving tongue, barking or otherwise.

By-law No. 205 is as follows:

A By-law of the Municipal District of Strathcona No. 83 to provide for the governing and destruction of dogs running at large.

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Hall J.

Under authority of Section 230 of the Municipal District Act, being Chapter 151 R.S.A., 1942 and amendments thereto, the Council of the Municipal District of Strathcona No. 83 enacts as follows:

1. For the purpose of this bylaw, the term "running at large" shall refer to any dog not under the immediate and effective control of its owner whether on the premises of its owner or otherwise.

2. No person shall, after the passing of this bylaw, suffer or permit any dog of which he is the owner to run at large within the Municipal District.

3. Any person or persons duly authorized or appointed by the Council for such purpose, shall immediately destroy all dogs found running at large.

4. This bylaw shall come into force immediately upon the passing thereof.

Counsel for the appellants relied strongly on the fact that there was no evidence at all that the appellants had any knowledge or suspicion that the dog in question had any propensity to disturb mink or the inclination or ability to leap over a high wire fence, and, relying on the law relating to the liability of the owner of a domestic animal for damage done by a domestic animal while at large, argued that liability could not be found against the appellants in the instant case in the absence of *scienter*.

It is not necessary, in my view, to review all the relevant authorities dealing with the liability of an owner of a domestic animal dealt with by both counsel in their full and helpful arguments before us. The appellants are entitled to succeed unless there are present in this case circumstances which were special in the sense that they created a duty on the part of the appellants towards the respondent and that there has been a breach of that duty.

To allow this dog which was strange to respondent's mink to run at large in this area in the whelping season with knowledge that there is a hostile reaction between mink and strange dogs was negligence. The appellants owed a duty to the respondent not to frighten the female mink at that particular time and were in breach of that duty in allowing the dog to run at large. Recognition of such a duty is implied in the provisions of *The Game Act* and the by-law to which I have referred.

For these reasons I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Liden, Ackroyd, Bradley & Philion, Edmonton.

Solicitor for the plaintiff, respondent: J. W. McClung, Edmonton.

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CANADIAN NATIONAL RAILWAY COMPANY (*Defendant*) ..... APPELLANT;

AND

E. & S. BARBOUR LIMITED (*Plaintiff*) ..... RESPONDENT.

*June 6
June 24

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND (ON APPEAL)

Shipping—Loss of cargo—Unseaworthy vessel—Due diligence not exercised by owner to make ship seaworthy—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Sched., Article IV, Rules 1, 2(a).

The plaintiff brought an action in respect of certain goods shipped by it from St. John's, Newfoundland, to Square Island, Labrador, and being carried by the defendant's motor vessel *Henry Stone* when that vessel sank in Goose Bay, Labrador, on November 19, 1959. The vessel, which at the time of the voyage in question was unseaworthy for navigation in ice, encountered ice conditions on her arrival at the entrance to Goose Bay. After the ship got through this ice, reports started to come from the engine room that she was leaking and within approximately one hour she sank. The judgment at trial allowing the plaintiff's claim was affirmed on appeal. With leave of the Court of Appeal an appeal was brought to this Court.

Held: The appeal should be dismissed.

The defendant, whose defence was based primarily on Article IV, Rule 2(*a*) of the Schedule to the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291, failed to discharge the burden of proving that the loss of the ship resulted from an "act, neglect, or default of the master . . . in the navigation or in the management of the ship". In any event, as the loss was occasioned by the fact that the *Henry Stone* was unseaworthy and unfit to encounter the ordinary perils of the voyage at the particular season in question, the exemption contained in Article IV, 2(*a*) could not be invoked to relieve the shipowner from responsibility. *Smith, Hogg & Co. v. Black Sea and Baltic General Insurance Co.,* [1940] A.C. 997, referred to.

The *Henry Stone* was not dispatched on an "ice free" voyage but rather on a voyage during which it was expected that she would be navigated in ice conditions which the master did not consider "unfavourable". The event proved that the vessel was unseaworthy for navigation even under such conditions and as no steps were taken by the defendant between the date of the steamship inspection and the date of the loss to fit the *Henry Stone* "to be navigated in ice" it could not be said that "the carrier" had discharged "the burden of proving the exercise of due diligence" to make the ship seaworthy, so as to claim exemption from liability under Article IV, Rule 1 of the Schedule to the Act.

APPEAL from a judgment of the Supreme Court of Newfoundland (on appeal)[1], affirming a judgment of Furlong C.J. Appeal dismissed.

*PRESENT: Taschereau C.J. and Abbott, Martland, Judson and Ritchie JJ.

[1] (1963), 37 D.L.R. (2d) 72.

1963

CANADIAN NATIONAL RAILWAY CO. v. E. & S. BARBOUR LTD.

P. J. Lewis, Q.C., and *J. W. G. MacDougall, Q.C.*, for the defendant, appellant.

W. G. Burke-Robertson, Q.C., and *D. Hunt*, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of the Supreme Court of Newfoundland (on appeal) from a judgment of that Court[1] affirming a judgment of Furlong C.J., and allowing the respondent's claim in respect of certain goods shipped by it from St. John's, Newfoundland, to Square Island, Labrador, and being carried by the appellant's motor vessel *Henry Stone* when that vessel sank in Goose Bay, Labrador, on November 19, 1959.

The goods in question were delivered to the coastal office of the appellant at St. John's, Newfoundland on November 6, 1959 and were consigned to B. W. Powell, one of the respondent's customers at Square Island aforesaid, in accordance with the provisions of bills of lading which were subject to the provisions of the *Water Carriage of Goods Act*.

It had originally been intended that the respondent's goods would be carried on the S.S. *Burgeo* but owing to the lateness of the season and the large quantity of freight awaiting shipment, the M.V. *Henry Stone* was pressed into service and it was thus that the respondent's goods were shipped by that vessel instead of the *Burgeo*.

The *Henry Stone* was a 17-year-old wooden vessel of 264.8 gross tons which had undergone extensive but not permanent repairs in the spring of 1959, and which was, at the time when she started on the voyage in question, operating with a temporary inspection certificate issued by the Department of Transport, good only until December 1959 and subject to the following limitations:

> To operate as non-passenger ship on home trade Class 2 voyages; within the limits of the Canadian East Coast Atlantic Coastal Waters as far north as Chidley, Labrador. *Not to be navigated in ice.* (The italics are mine.)

The appellant's marine superintendent, who appears to have been responsible for sending the *Henry Stone* on this voyage, quite frankly admitted that, due to the lateness of the season and his knowledge of the conditions at Goose

[1] (1963), 37 D.L.R. (2d) 72.

Bay, he anticipated that ice would be encountered and he describes the steps which he took to guard against this danger as follows:

> The *Henry Stone* was the first available vessel and contemplating the ice due to the lateness of the season I had consulted with the Captain of the *Burgeo* and the Captain of the *Henry Stone* and arranged with them that in the event of meeting any conditions, unfavourable ice conditions at Goose Bay, that the *Henry Stone* would come to Cartwright and make contact with the *Burgeo* and the *Burgeo* would come and take the freight from him, and in no event was the *Burgeo* to leave the coast without seeing that the *Henry Stone* had completed her work.

The master of the *Henry Stone,* Captain John Tobin, gives the following account of these instructions:

> A. Yes, I had instructions from Mr. Healey before we left St. John's. He was sending us out on this trip and it was up in November and as usual you would be expecting ice conditions for that time of the year. So he told me the *Burgeo* was enroute to Goose Bay and to keep in contact with the *Burgeo,* and if conditions at Goose Bay were unfavourable for the *Henry Stone* to go to Goose Bay, for the *Henry Stone* to go to Cartwright and the *Burgeo* would come to Cartwright and take the freight and deliver it.
>
> Q. And tranship the freight? A. That's right.
>
> Q. That is if ice conditions in Goose Bay were such that—. Who was making the decision—you? A. Well, I wouldn't—I guess I was responsible for the *Henry Stone.* I guess it would be my decision. If I went in to Cartwright before we got down there, well, I'd have to—. Whoever I was talking to up there on ice conditions I would have to go by what they tell me.
>
> Q. All right. Yes, but I just want to get the facts now. You did have instructions before you left? A. That's right.
>
> Q. That you were to keep in contact or in communication with the Master of the *Burgeo*? A. That's right.
>
> Q. And if ice conditions were such in Goose Bay that you think you shouldn't enter, then the *Burgeo* would tranship the freight for you from Cartwright. Is that the position? A. That's right.

It is apparent also from Captain Tobin's evidence that he thought that the direction "not to be navigated in ice" which was contained in the certificate applied only to heavy arctic ice and that it did not include such ice as he encountered at Goose Bay. The appellant's marine superintendent indicated on direct examination that he shared this opinion and although he qualified this evidence considerably on cross-examination, there is no indication that he ever explained to Captain Tobin the kind of ice that was to be treated as "unfavourable".

After a rough but not hazardous voyage, which included calls at one port of loading (Carbonnear) and three ports of discharge, the vessel, while en route to Goose Bay,

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CANADIAN NATIONAL RAILWAY CO. v. E. & S. BARBOUR LTD.

Ritchie J.

encountered the government icebreaker *Ernest Lapointe,* whose master reported on the Goose Bay ice conditions saying "Ice conditions were not bad; there was three or four inches of ice there but he did not think we would have any difficulty getting up through there". In addition to obtaining this information, Captain Tobin kept in constant touch with the *Burgeo* which was then at Goose Bay. On arriving at Sandy Point, which is at the entrance to Goose Bay, at 3:00 a.m. on November 19, the *Henry Stone* waited until daylight and at about 7:45 entered the channel leading to the bay. The conditions in the channel are described by the master as follows:

> A. It was level ice, but it wasn't a hard ice; it was a tough sort of ice, but it was moving out from the Bay. You see it was—I guess where—wherever the boats came down probably it was broke off or something like that, because it was moving out; because we eventually got through the ice you see—got in clear water. The day before that they broke; the ice was right in to Goose Bay you see. It was slow going, but with the ice coming out now, well, that made it so much slower you see; because we were cutting ice. Well, we weren't covering the ground, that we were cuting the ice—say it that way. The ice was moving but it wasn't heavy ice; it was touch to get through. It was this kind of soft tough ice.

After the vessel got through the ice at about 10:30, reports started to come from the engine room that she was leaking, and it soon became apparent that the pumps were unable to cope with the mounting water. Between 11:30 and 12:00 o'clock, or a little later, the ship sank.

There is some suggestion in the reasons for judgment of the learned trial judge that the sinking may have been due to a leak occurring before the vessel entered the ice which resulted in water being penned up in the forward hold, but I agree with counsel for the appellant that the two and three-quarter hour run through the ice at Goose Bay was by far the most likely cause of the sinking which occurred because of the fact that the vessel was unseaworthy for navigation in ice.

Before this Court, the appellant based its defence primarily on Article IV, Rule 2(*a*) of the Schedule to the *Water Carriage of Goods Act,* which reads as follows:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
>
> (*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or the management of the ship;

It was contended on behalf of the appellant that the master was negligent in entering the approaches to Goose Bay with the ice conditions as they were on November 19, and that it was this negligence which caused the loss.

The marine superintendent who was "in complete charge of the operating and overall supervision of the steamship operations" for the appellant in Newfoundland deliberately dispatched the vessel on this voyage to a destination where it was "usual" for ice to be encountered in the month of November and in so doing he left the master with the impression that he was to be guided by information which he received from persons on the spot and particularly from the *Burgeo* in deciding whether or not ice conditions were unfavourable for the *Henry Stone* at Goose Bay.

As I interpret the evidence, the master carried out these instructions as best he could and, in my opinion, the appellant has failed to discharge the burden of proving that the loss of the ship resulted from an "act, neglect, or default of the master . . . . . in the navigation or in the management of the ship".

In any event, as I find that the loss was occasioned by the fact that the *Henry Stone* was unseaworthy and unfit to encounter the ordinary perils of the voyage at the particular season in question, I am of opinion that the exception contained in Article IV, 2(*a*) cannot be invoked to relieve the shipowner from responsibility. In this regard, I refer to what was said by Lord Wright in *Smith, Hogg & Co. v. Black Sea and Baltic General Insurance Co.*[1] In that case, there was a clause in the charterparty providing that the shipowner would not be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy; and also that the shipowner should not be responsible for loss or damage arising from (amongst other things) act, neglect or default of the master in the navigation or management of the ship . . . The trial judge held that the accident there in question took place not by reason of the unseaworthiness of the ship but by reason of the acts of the master, which he found to have been wrong in the circumstances, and that the shipowner was entitled to succeed by reason of the above exception.

[1] [1940] A.C. 997.

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In the course of his reasons for judgment, Lord Wright, in reversing the trial judge, said at p. 1004:

> I think the contract may be expressed to be that the shipowner will be liable for any loss in which those other causes covered by exceptions co-operate, if unseaworthiness is a cause, or if it is preferred, a real, or effective or actual cause.

Having found that the loss of the *Henry Stone* was occasioned by unseaworthiness, it remains to be determined whether due diligence was exercised by the owner to make the ship seaworthy. Article IV, Rule 1 of the Schedule to the *Water Carriage of Goods Act*, reads as follows:

> Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.
>
> Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

The *Henry Stone* was not dispatched on an "ice free" voyage but rather on a voyage during which it was expected that she would be navigated in ice conditions which the master did not consider "unfavourable". The event proved that the vessel was unseaworthy for navigation even under such conditions and as no steps were taken by the appellant between the date of the steamship inspection and the date of the loss to fit the *Henry Stone* "to be navigated in ice" I do not think that it can be said that "the carrier" has discharged "the burden of proving the exercise of due diligence . . ." which rests on it under this rule. For these reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: P. J. Lewis, St. John's.

Solicitors for the plaintiff, respondent: Halley, Hickman, & Hunt, St. John's.

PRISCILLA MAY BURKE (*Plaintiff*) ....APPELLANT;

1963

*May 27
June 24

AND

GEORGE PERRY AND IRENE PERRY (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Motor vehicle accident—Injuries sustained by gratuitous passenger—Whether negligent actions of driver constituted gross negligence—Opinion of appellate court as to quality of negligence not to be substituted for that of trial judge—Highway Traffic Act, R.S.M. 1954, c. 112, s. 99(1).

The plaintiff sustained injuries as the result of an accident which occurred while she was a gratuitous passenger in a motor vehicle owned by the male defendant and operated by the female defendant. In an action for damages, the trial judge found that the accident was occasioned by the gross negligence of the female defendant so as to give rise to liability under s. 99(1) of the *Highway Traffic Act,* R.S.M. 1954, c. 112. The trial judge was of opinion that no single act on the part of the female defendant amounted in itself to gross negligence, but that the cumulative effect of her negligent acts did constitute gross negligence. An appeal was allowed by the Court of Appeal where the majority held that while it was perfectly proper to consider a number of related acts or omissions which, taken cumulatively, might establish gross negligence, each or at least some of the related acts should possess a more flagrant quality than they had here if they were to be capable of being accumulated to show a pattern of behaviour amounting to gross negligence. An appeal from the judgment of the Court of Appeal was brought to this Court.

Held: The appeal should be allowed and the decision of the trial judge restored.

The defendant's behaviour was very near the borderline between simple negligence and gross negligence, but the difficult task of assessing the quality of the negligent actions of the driver of a motor vehicle immediately before and at the time of an accident in order to determine whether or not they are to be characterized as "gross negligence" involves a reconstruction of the circumstances of the accident itself including the reactions of the persons involved, and this was a function for which the judge who has seen and heard the witnesses is far better equipped than are the judges of an appellate court. Since the trial judge did not misdirect himself as to the law and as the main facts were not in dispute, this was not a case in which the opinion of an appellate court as to the quality of the negligence should be substituted for the opinion reached by the trial judge.

APPEAL from a judgment of the Court of Appeal for Manitoba, allowing an appeal from a judgment of Maybank, J. Appeal allowed.

*PRESENT: Taschereau C.J. and Martland, Judson, Ritchie and Hall JJ.

1963

BURKE v. PERRY AND PERRY

R. R. Brock, for the plaintiff, appellant.

C. R. Huband, for the defendants, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Manitoba (Freedman and Schultz JJ.A. dissenting) setting aside the judgment of Mr. Justice Maybank at the trial of the action whereby he had awarded damages in the amount of $7,880.90 to the appellant in respect of injuries sustained by her as the result of an accident which occurred while she was being transported as a guest passenger without payment for transportation in a motor vehicle owned by the respondent George Perry and operated by the respondent Irene Perry. The learned trial judge found that the accident was occasioned by the gross negligence of Irene Perry so as to give rise to liability under s. 99(1) of the *Highway Traffic Act,* R.S.M. 1954, c. 112, and the appellant now appeals from the reversal of that finding by the Court of Appeal and also seeks to have the damages increased.

The accident in which Miss Burke was injured occurred at about 11:30 on the evening of July 17, 1961, when Mrs. Perry was driving her husband's motor vehicle over the Disraeli Freeway in the City of Winnipeg. It was dark and raining so heavily that the windshield wipers were not able to keep the windshield clear at all times, and as the car approached the slippery surface of the bridge it was required to round an ascending curve. At about this time, at least one passenger in the car asked Mrs. Perry to slow down but she continued at a speed of about 30 miles per hour and in so doing passed two other cars.

There is some evidence that the tires were worn smooth and due to a combination of this factor, the slippery surface of the bridge, and the speed at which she was travelling Mrs. Perry lost control of the vehicle. Once out of control, the car went across the travelled portion of the bridge and the left-hand sidewalk and barged into the iron railing substantially damaging the railing and the car, and causing the appellant to sustain the serious facial lacerations and other injuries in respect of which she has brought this action.

The learned trial judge was careful to explain that no single act on the part of Mrs. Perry amounted in itself to "gross negligence" but he took the view that the cumulative effect of her negligent acts did constitute that "very marked

departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves" which characterizes "gross negligence" within the meaning attributed to that term by Sir Lyman Duff in *McCulloch v. Murray*[1].

Guy J.A., who delivered the reasons for judgment of the majority of the Court of Appeal, made an elaborate review of the evidence, and concluded by saying:

> While the authorities are clear that it is perfectly proper to consider a number of related acts or omissions which, taken cumulatively, might establish gross negligence, my own view is that each or at least some of the related acts should possess a more flagrant quality than they have here if they are to be capable of being accumulated to show a pattern of behaviour amounting to gross negligence.
>
> The general principle relating to cumulative acts of negligence amounting *in toto* to gross negligence was considered by my brother Freedman when he wrote the majority judgment of this Court in the case of *Wruck v. Krzuk* (1962) 37 W.W.R. 68. In that particular case, we dealt with a more aggravated speed than in the instant case, and the other aspects were regarded as incidental. Mr. Justice Freedman came to the conclusion that gross negligence had not been proved.

In *Wruck v. Krzuk, supra,* the appeal was against a finding that the conduct in question did not amount to gross negligence and in the course of his judgment, Freedman J.A. said at p. 72:

> Where as here the tribunal consists of a judge sitting without a jury it is entirely a question for him. An appellate court should be slow to substitute its opinion for his as to whether the defendant's conduct amounts to gross negligence.

In support of this proposition, the learned judge relied on the case of *Semeniuk v. Scoyoc*[2], in which Cartwright J., speaking for the majority of this Court, said:

> In my view, where the conduct of a party is clearly negligent and the Judge presiding at a trial without a jury has neither misdirected himself as to the law nor misapprehended the primary facts an appellate court should be slow to substitute its opinion for his as to whether such party's conduct amounts to gross negligence.

I am conscious of the fact that Mrs. Perry's behaviour was very near the borderline between simple negligence and gross negligence and I can readily understand the difference of opinion which existed in the Courts below, but the difficult task of assessing the quality of the negligent actions of the driver of a motor vehicle immediately before and at

[1] [1942] S.C.R. 141, 2 D.L.R. 179. [2] [1955] 4 D.L.R. 780.

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Ritchie J.

the time of an accident in order to determine whether or not they are to be characterized as "gross negligence" involves a reconstruction of the circumstances of the accident itself including the reactions of the persons involved, and this is a function for which the trial judge who has seen and heard the witnesses is far better equipped than are the judges of an appellate court.

I am satisfied that the learned trial judge did not misdirect himself as to the law and as the main facts are not in dispute I am, with respect, unable to agree with the majority of the Court of Appeal that this is a case in which the opinion of an appellate court as to the quality of the negligence should be substituted for the opinion reached by the learned trial judge. Like Freedman J.A., I do not consider the award of general damages to be so inordinately low as to warrant interference by an appellate tribunal.

For these reasons as well as for those contained in the dissenting opinion delivered by Freedman J.A. on behalf of himself and Mr. Justice Schultz, I would allow this appeal and restore the decision of the learned trial judge. The appellant should have her costs in the Court of Appeal and in this Court but as she was granted leave to appeal to this Court in *forma pauperis* the costs of this appeal will be governed by the provisions of Rule 142 of the Rules of the Supreme Court of Canada.

Appeal allowed with costs; Supreme Court rule 142 to apply.

Solicitors for the plaintiff, appellant: Thompson, Dilts, Jones, Hall, Dewar & Ritchie, Winnipeg.

Solicitors for the defendants, respondents: Richardson, Richardson, Huband & Wright, Winnipeg.

IMPERIAL OIL LIMITED (*Plaintiff*) ....APPELLANT;

AND

PLACID OIL COMPANY (*Defendant*) ..RESPONDENT.

1963

*May 22

June 24

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real property—Petroleum and natural gas lease—Farm-out agreement—Production of petroleum—Property interest of Crown in percentage of recoverable oil—Effect on royalty obligations—The Road Allowances Crown Oil Act, 1959, (Sask.), c. 53.

One B, as registered owner, leased to the plaintiff all the petroleum, natural gas and related hydrocarbons within, upon or under certain described lands. He also leased to the plaintiff his right, title, interest and estate in and to the leased substances, or any of them, within, upon or under any lands excepted from, or roadways, lanes, or rights-of-way adjoining, the said lands. The plaintiff agreed to pay a gross royalty on the leased substances produced, saved and marketed from the lands, which royalty, in respect of crude oil, was fixed at 12½ per cent of the current market value of the crude oil produced.

By a farm-out agreement the defendant agreed to drill a well and to pay the plaintiff upon production an overriding royalty of 5 per cent of the value of all crude oil and naphtha produced. The defendant agreed to perform all of the plaintiff's obligations under the lease and to indemnify the plaintiff against all claims and demands which it might sustain, pay or incur consequent upon the failure of the defendant to carry out any of the plaintiff's obligations contained in the lease.

Petroleum production was obtained and the defendant, when paying the royalties to the lessor and to the plaintiff in respect of its production of oil from the lands during the period in question, computed same upon the total production of such oil, less 1.88 per cent thereof, and claimed that it was entitled to make the deduction by reason of *The Road Allowances Crown Oil Act, 1959*. The plaintiff, apparently feeling itself obligated to do so under the terms of the lease, thereupon proceeded to pay to the lessor the difference between a royalty computed on the total production and the amount of the royalty which had been paid to the lessor by the defendant. It then proceeded to sue the defendant for the amount which it had paid to the lessor and also for the difference between the 5 per cent overriding royalty computed on the total production and the amount of royalty which had been paid to the plaintiff by the defendant.

Both the Courts below decided in favour of the defendant and dismissed the plaintiff's action. The plaintiff then appealed to this Court, with leave of the Court of Appeal.

Held: The appeal should be dismissed.

Section 3 of *The Road Allowances Crown Oil Act, 1959,* declared a property interest in the Crown of 1.88 per cent of all the recoverable oil within the whole of a producing reservoir. No matter where the oil migrated

*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

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IMPERIAL OIL LTD. v. PLACID OIL CO.

the Crown's interest remained in it and, on production, the property interest still remained. After the Act had provided for the payment to the Crown of 1 per cent of the value of all oil produced, or for the delivery of that percentage in kind in lieu of payment, s. 6 then provided that the owner might retain and dispose of "oil declared by section 3 to be the property of the Crown" to the extent of .88 per cent of the oil produced. This was a clear indication that the declaration contained in s. 3 was as to the ownership of oil produced from a reservoir and that of the 1.88 per cent thereof belonging to the Crown the owner, after paying for or delivering 1 per cent to the Crown, would be free to dispose of the remaining portion of the Crown interest for his own benefit. It followed that the defendant could not be compelled to pay royalty, under the provisions of the lease or the farm-out agreement, upon all the oil produced from the lands, because of that oil, 1.88 per cent was the property of the Crown.

So far as the lease was concerned, the obligation to pay royalty was upon the leased substances owned by the lessor and leased and granted by him to the lessee. The lessee could not be compelled to pay royalty upon oil which did not belong to the lessor. Similarly the defendant could not be obligated to pay royalty to the plaintiff, under the farm-out agreement, on that portion of the oil which it produced, not by virtue of rights conferred upon it by the lease, but pursuant to the provisions of the Act.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Brownridge J. Appeal dismissed.

J. Lorn McDougall, Q.C., and *D. E. Lewis, Q.C.*, for the plaintiff, appellant.

L. Harris McDonald, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The issue in this case involves the determination of the purpose and meaning of *The Road Allowances Crown Oil Act, 1959*, (Sask.), c. 53, which came into force on April 1 of that year and which is hereinafter referred to as "the Act".

The appellant is the lessee under the provisions of a petroleum and natural gas lease, dated April 23, 1949, from Emile Boutin, as lessor, in respect of the North Half of Section 15, Township 6, Range 1, West of the Second Meridian, in the Province of Saskatchewan, hereinafter referred to as "the lands". The lessor, as registered owner, or entitled to become registered owner, of the petroleum,

[1] (1962), 40 W.W.R. 412, 36 D.L.R. (2d) 122.

natural gas and all related hydrocarbons within, upon or under the lands, granted and leased to the appellant all petroleum, natural gas and related hydrocarbons, except coal and valuable stone, which were referred to in the lease as the "leased substances", within, upon or under the lands. He also granted and leased to the appellant his right, title, interest and estate in and to the leased substances, or any of them, within, upon or under any lands excepted from, or roadways, lanes, or rights-of-way adjoining, the lands.

The appellant agreed to pay a gross royalty on the leased substances produced, saved and marketed from the lands, which royalty, in respect of crude oil, was fixed at 12½ per cent of the current market value of the crude oil produced.

Clause 4 of the lease provided as follows:

4. LESSER INTEREST:—

If the Lessor's interest in the leased substances be less than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the Lessor only in the proportion which his interest bears to the whole and undivided fee.

On March 30, 1959, the appellant and the respondent entered into a farm-out agreement, whereby the respondent agreed to drill a well on the lands and would thereby become entitled to earn the right to acquire the appellant's interest under the lease for the term of the lease less the last day thereof. An overriding royalty was provided in favour of the appellant on the production of petroleum substances from the lands, which, in the case of crude oil and naphtha, was 5 per cent of the value thereof produced from the lands. The respondent agreed to perform all of the appellant's obligations under the lease and to indemnify the appellant against all claims and demands which it might sustain, pay or incur consequent upon the failure of the respondent to carry out any of the appellant's obligations contained in the lease. The respondent did drill a well on the lands and obtained therefrom petroleum production.

The relevant provisions of the Act are as follows:

2. In this Act:

* * *

3. "oil" means crude petroleum oil and all other hydrocarbons, regardless of gravity, that are produced at a well in liquid form by ordinary production methods;

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Martland J.

4. "owner" means a person who has a right to drill into an underground reservoir and produce therefrom oil or gas or oil and gas and to appropriate the oil or gas he produces either to himself or others or to himself and others;

* * *

3. In every producing oil reservoir one and eighty-eight one-hundredths per cent of the recoverable oil shall be deemed to be within, upon or under road allowances and shall be the property of the Crown.

4.—(1) Except as provided in section 5, every owner producing oil shall be liable to pay and shall on or before the last day of each month, commencing with the month of May, 1959, pay to the minister one per cent of the value, calculated on the average prevailing well-head price, of the oil produced, free and clear of any deductions, during the preceding month.

Section 5 provided that the Minister of Mineral Resources could elect to take payment in kind instead of the money payment provided for in s. 4.

Section 6 provided as follows:

6. Subject to compliance with section 4 or 5, every owner producing oil may retain and dispose of oil declared by section 3 to be the property of the Crown to the extent of eighty-eight one-hundredths of one per cent of the oil produced, or the proceeds of the sale thereof, for his own use and benefit.

It is conceded that in this case the respondent is the "owner" within the meaning of subs. 4 of s. 2.

The question in issue is as to whether, in the light of the provisions of the Act, the respondent, in paying the royalties to the lessor under the lease and to the appellant under the farm-out agreement, is obligated to pay in respect of all the oil produced by it from the lands, or is obligated only to pay royalty upon (a) that quantity, less 1.88 per cent thereof, or (b) that quantity, less 1 per cent thereof. The respondent, when paying the royalties to the lessor and to the appellant in respect of its production of oil from the lands during the months from and including May 1959 to February 1960, computed the same upon the total production of such oil, less 1.88 per cent thereof. The appellant, apparently feeling itself obligated to do so under the terms of the lease, thereupon proceeded to pay to the lessor the difference between a royalty computed on the total production during the period in question and the amount of the royalty which had been paid to the lessor by the respondent. It then proceeded to sue the respondent for the amount which it had paid to the lessor and also for the difference between the 5 per cent

overriding royalty computed on the total production and the amount of royalty which had been paid to the appellant by the respondent.

Both the Courts below decided in favour of the respondent and dismissed the appellant's action. The appellant has appealed to this Court, with the leave of the Court of Appeal of Saskatchewan.

The appellant's contention may be summarized as follows: Section 3 of the Act does nothing more than to define, in arithmetic terms, the amount of oil, in place in a reservoir, which belongs to the Crown, as being within, upon or under road allowances. The title to such oil, in place, was already in the Crown by virtue of *The Mineral Resources Act, 1931,* (Sask.), c. 16, carried forward into c. 47 of the Revised Saskatchewan Statutes 1953, which was in effect when the Act came into force. That Act provided that mines, minerals and mining rights, in, on or under all public highways and road allowances, should continue to be vested in the Crown and might be leased or otherwise disposed of under the regulations. The Act does not purport to provide that the Crown is the owner of oil when actually produced at a well. Such oil is the property of the producer. Though he is compelled, by s. 4 of the Act, to pay to the Minister of Mineral Resources 1 per cent of the value of the production, this does not alter, in any way, the contractual obligation, imposed by the lease and the farm-out agreement, to pay royalty upon all the oil produced. That is a contractual obligation which is not affected by the provisions of the Act.

I am unable to accept this interpretation of the Act. Section 3 refers to a "*producing* oil reservoir"; *i.e.,* a reservoir from which oil, as defined in subs. 3 of s. 2, is being produced; namely, crude oil and those other hydrocarbons which, regardless of gravity, are produced at a well in liquid form by ordinary production methods. In such a reservoir 1.88 per cent of the oil which is recoverable is declared to be the property of the Crown. In my opinion, the consequence of this provision is that, of the oil which is actually produced

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from a producing reservoir, 1.88 per cent belongs to the Crown.

Counsel for the appellant contends that oil is a fugitive and migratory substance and that the law of capture applies to it. He cites, from the judgment of the Privy Council in *Borys v. Canadian Pacific Railway Company*[1], the following passage:

> The substances were fugacious and were not stable within the container, although they could not escape from it. If any of the three substances was withdrawn from a portion of the property which did not belong to the appellant but lay within the same container, and any oil or gas situated in his property thereby filtered from it to the surrounding lands, admittedly he had no remedy. So, also, if any substance was withdrawn from his property, thereby causing any fugacious matter to enter his land, the surrounding owners had no remedy against him. The only safeguard was to be the first to get to work, in which case those who made the recovery became owners of the material which they withdrew from any well which was situated on their property or from which they had authority to draw.

Lord Porter has here summarized the legal position of a landowner from within whose lands oil has migrated to the land of an adjoining landowner by reason of the operation of a well upon that land. Such, in the absence of s. 3 of the Act, would have been the legal position of the Crown in respect of oil which migrated from beneath a road allowance because of the operation of a well on adjoining land.

Section 3, however, declares a property interest in the Crown of 1.88 per cent of all the recoverable oil within the whole of a producing reservoir. This is a property interest, not in relation to oil situated beneath the surface of specific lands, but in respect of a portion of all the oil in the whole of a reservoir. The result is that, no matter to where the oil in that reservoir migrates, the Crown's interest remains in it and, on production, the property interest still remains.

This view of the effect of s. 3 is reinforced by the wording of s. 6. After the Act has provided for the payment to the Crown of 1 per cent of the value of all oil produced, or for the delivery of that percentage in kind in lieu of payment, s. 6 then goes on to provide that the owner may retain and dispose of "oil declared by section 3 to be the property of

[1] [1953] A.C. 217 at 220.

the Crown" to the extent of .88 per cent of the oil produced. This is a clear indication that the declaration contained in s. 3 was as to the ownership of oil produced from a reservoir and that of the 1.88 per cent thereof belonging to the Crown the owner, after paying for or delivering 1 per cent to the Crown, would be free to dispose of the remaining portion of the Crown interest for his own benefit.

Applying this view of the effect of s. 3 of the Act, it must, I think, follow that the respondent cannot be compelled to pay royalty, under the provisions of the lease or the farm-out agreement, upon all the oil produced from the lands, because, of that oil, 1.88 per cent is the property of the Crown.

In so far as the lease is concerned, the obligation to pay royalty is upon the leased substances owned by the lessor and leased and granted by him to the lessee. The lessee cannot be compelled to pay royalty upon oil which does not belong to the lessor and this conclusion, which, I think, must follow, even apart from the provisions of clause 4 of the lease, is reinforced by the terms of that clause.

Similarly, in my opinion, the respondent cannot be obligated to pay royalty to the appellant, under the farm-out agreement, on that portion of the oil which it produces, not by virtue of rights conferred upon it by the lease, but pursuant to the provisions of the Act.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: McDougall, Ready & Hodges, Regina.

Solicitors for the defendant, respondent: Balfour, MacLeod, McDonald, Laschuk & Kyle, Regina.

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*Mar. 13, 14

June 24

CHAPPELL'S LIMITED (*Defendant*) ....APPELLANT;

AND

MUNICIPALITY OF THE COUNTY OF CAPE BRETON (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Negligence—Defendant general contractor employing independent contractor to make particular repair on plaintiff's building—No contract as between defendant and plaintiff to effect repair—Building destroyed by fire because of independent contractor's negligence—Extent of duty owed to plaintiff by defendant.

The defendant contractor was engaged in making certain repairs to a building owned by the plaintiff and instructed an independent contractor to solder a hole in the gutter. While the servant of the independent contractor was proceeding to effect this repair, a fire was caused by the servant's negligent operation of a lighted blowtorch and resulted in the destruction of the building. The plaintiff's claim was, initially, framed as one for breach of contract by the defendant, but no contract by the defendant with the plaintiff to repair the gutter was proved, and the case proceeded to trial solely as a claim that the defendant was vicariously liable for the negligence of the workman in doing that work. The trial judge dealt with the case as being one which involved the issue of liability of the defendant for the negligence of an independent contractor hired by it. He decided that the work done by the servant was not, by its nature, inherently dangerous and consequently that the case was not one in which liability would attach to the defendant in respect of the negligence of the servant of its independent contractor. The Court of Appeal, by a majority, allowed an appeal from this judgment and the defendant then brought an appeal to this Court.

Held: The appeal should be allowed and the judgment of the trial judge restored.

The issue was as to the extent of the duty owed to a claimant by a person who contracts with an independent contractor to do work, not for himself, but for the claimant, at the claimant's request, if the claimant's own property is then damaged because of negligence on the part of the independent contractor who is working on it. The plaintiff had failed to prove any contract between the defendant and itself whereby the defendant undertook to effect the repair of the gutter. The only connection of the defendant with the matter was the actual hiring of the services of the independent contractor and providing him with the staging from which to do the work. In these circumstances, the duty owed by the defendant to the plaintiff was no more than to exercise reasonable care in the selection of a competent independent contractor to perform the work. There was no suggestion in the evidence that the choice made by the defendant was an improper one and, therefore, there was no evidence of a breach of that duty.

*PRESENT: Taschereau, Cartwright, Martland, Judson and Ritchie JJ.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *in banco*[1], allowing by a majority an appeal from a judgment of Parker J. Appeal allowed.

J. H. Dickey, Q.C., and *J. J. Fitzpatrick, Q.C.*, for the defendant, appellant.

C. M. Rosenblum, Q.C., and *G. S. Black*, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This case involves a claim for damages sustained by the respondent as a result of the destruction by fire, on November 12, 1959, of the court-house building owned by it in the City of Sydney. For some days prior to that date, and on that day, employees of the appellant had been engaged in making repairs to the exterior of the building. On that day James Garland, a servant of George Garland who was the owner of a small roofing and sheet metal business in Sydney, went to the top of a scaffolding on the south side of the building, which had been erected by the appellant, for the purpose of repairing a hole in the gutter; this hole was about the size of a fifty-cent piece. He took with him a blowtorch, a soldering iron and other necessary materials. He lit the blowtorch, placed it in the gutter with the flame pointing along the length of the gutter and put the soldering iron on to heat. His reason for placing the torch in the gutter was that there was a wind blowing from the south and he thought that if he left it on the scaffolding it would be blown out. The gutter was made of copper about one-sixteenth of an inch in thickness; it was about ten inches deep; its width at the top was about nine inches and at the bottom about seven inches. The base of the blowtorch was round; it was about six inches in diameter and eight inches in height; when placed in the gutter it went right to the bottom. In the position in which Garland was working nothing inflammable was exposed; the walls of the building were brick; the shingles on the roof were not wood; copper flashing came down from the roof and lapped over the metal of the gutter. The flashing and the gutter were nailed to a wooden fascia board but no part of this board was visible.

[1] (1962), 36 D.L.R. (2d) 58.

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The learned trial judge found that the fire was caused by the heat from the blowtorch passing through the metal of the flashing and the gutter and igniting the fascia board. He found that the fire was caused by the negligence of James Garland and this finding was not questioned before us.

The circumstances which led to James Garland being present at the building on that day were as follows: An employee of the appellant, who had been engaged in replacing copper moulding on the building, had noticed the hole in the gutter. He brought this to the attention of a Mr. Carmichael, the County Clerk, who had previously requested the employees of the appellant to advise him as to the condition of the building. Subsequent to Carmichael's receiving this advice, a Mr. MacInnis, the appellant's foreman, attended at the shop of George Garland.

The only evidence as to the arrangement which was made for the repair of the gutter to be done by James Garland is that which James Garland gave at the trial. Neither Carmichael nor MacInnis gave evidence. James Garland testified that he overheard a conversation between his father, George Garland, and MacInnis, in which the latter wished to have James Garland go up and solder the gutter. MacInnis told James Garland where the hole was which he was to repair and James Garland went to examine it. The staging was not high enough for him to reach the hole and, in consequence, the appellant's employees increased the height of the staging from which James Garland worked. James Garland went to do the work upon the instructions of his father.

The respondent commenced action against the appellant, claiming in contract, alleging that:

> On or about the 1st day of November, A.D. 1959, the Defendant entered into a contract with the Plaintiff pursuant to which the Defendant undertook to effect certain repairs to the Court House building aforesaid and it was a term of the said contract, express or implied, that the Defendant would use reasonable care and due diligence, and would see that reasonable care and due diligence was used by others employed by it, in and about and during the performance of the said work, for the safe performance thereof and the preservation of the Plaintiff's property.

This was followed by an allegation that on November 12, 1959, the servants or agents of the defendant, while engaged in the performance of the work included in the contract, negligently set fire to the building. Particulars of the neg-

ligence were then given. The appellant, in its statement of defence, denied that it was under contract to do this work, or that its servants or agents negligently set fire to the building.

Had the respondent been able to establish the contract which it pleaded and that the repair of the gutter was included in the work which the appellant had contracted to perform, the respondent would have been entitled to succeed against the appellant, irrespective of whether James Garland was a servant of the appellant or a servant of an independent contractor hired by the appellant to do that work. By contracting to do the work the appellant would have been under an obligation to the respondent to do the work itself, or to ensure that it was done, carefully. In such a case the appellant could not have evaded its contractual duty by delegating the performance of the work to someone else.

However, the respondent was apparently unable to prove such a contract. There was no evidence led to establish its existence and counsel for the respondent at the trial stated that he was basing his claim solely in negligence.

The learned trial judge dealt with the case as being one which involved the issue of liability of the appellant for the negligence of an independent contractor hired by it. He said:

> In my opinion, what the evidence shows is that James Garland was at all relevant times the servant of his father, George Garland. The legal relationship between the defendant and George Garland was that of a general contractor and an independent subcontractor.

He decided that the work done by James Garland was not, by its nature, inherently dangerous and consequently that the case was not one in which liability would attach to the appellant in respect of the negligence of the servant of its independent contractor.

From this decision the respondent (at that time the appellant) appealed to the Court of Appeal. The case was dealt with in that Court upon the same basis. MacQuarrie J., who delivered the reasons of the majority of the Court, said:

> With deference, in my opinion, . . . the matter comes to this, that it is reasonable to conclude on the whole of the evidence that the work that was done by George Garland and James Garland in connection with soldering the hole in the copper gutter, was done by George Garland engaged by Mr. MacInnis to do work in connection with the Court House

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repairs as an independent contractor working for the respondent and by James Garland as the servant of George Garland.

He went on to hold, however, that:

> In my opinion, considering all the circumstances in the present case, the respondent ordered the doing of work, which, if done by the usual method, would create a danger of fire to the appellant's building, and it thereupon came under a duty either to provide that the dangerous method be not used or to provide that, if it were used, all necessary precautions against fire be taken, and it could not escape liability for the non-performance of such duty by delegating its performance to George Garland.

MacDonald J. dissented and, for the reasons which he stated, agreed with the conclusion reached by the learned trial judge that "it cannot be said that such work was by its nature inherently dangerous."

The Court of Appeal permitted the respondent to amend its pleadings so as to plead, in addition to the allegation of negligence on the part of the appellant, its servants or agents, which it had previously pleaded, an additional allegation of negligence on the part of its independent contractor.

With the greatest respect for the conclusions reached in the Courts below, I find it difficult to see how the relationship of contractor and subcontractor could have existed as between the appellant and George Garland, when there is no evidence of a main contract, as between the appellant and the respondent, involving any responsibility on the part of the appellant to repair the gutter. On the evidence in this case it cannot be said that the appellant contracted with the respondent to do that work and consequently it was under no duty to the respondent to perform it. It is not possible to infer such a contract from the conversation between MacInnis and George Garland without any additional supporting evidence. It must be recalled that the evidence shows that the hole in the gutter had been disclosed to Carmichael. There is no evidence to establish what instructions were thereafter given by Carmichael to MacInnis. I do not see how it is possible to infer that MacInnis undertook, as a matter of contract with the respondent, that the appellant should undertake that work merely because later he requested George Garland to have that work done. Carmichael might have requested that the

appellant undertake that work as a matter of contract. On the other hand, he might equally well have requested MacInnis to arrange that someone should do the work. The respondent failed to prove any contract between the appellant and itself whereby the appellant undertook to effect the repair of the hole in the gutter.

The absence of such a contract is of great importance, not only because the appellant cannot be held liable in contract in respect of the damage which occurred, but also because it has a very important bearing in determining the question as to whether the appellant became vicariously responsible for the negligence of George Garland's employee James Garland. How, in the absence of such a contract, is the rather scanty evidence given by James Garland to be construed in determining the legal relationship between the appellant and George Garland? In my opinion there is no more reason for construing the conversation between George Garland and MacInnis as leading to the inference that MacInnis made a contract with George Garland to do the repair work on behalf of the appellant than there is for construing the evidence as leading to the inference that MacInnis requested George Garland to do the work for the respondent. If the appellant was not obligated by contract to do this work itself, why should it enter into a contract with George Garland that he do the work in question on behalf of the appellant? If the second of the above inferences is drawn, then that is an end of the matter, for, in that case, George Garland was never an independent contractor of the appellant's and consequently there could be no vicarious liability on its part for the negligence of George Garland's servant. As the onus rested upon the respondent to establish the relationship between the appellant and George Garland, I would think that we are not entitled to adopt the first inference.

But, in any event, even if that inference were to be drawn, I do not see how it can lead to liability on the part of the appellant, in the absence of the existence of a main contract between the appellant and the respondent whereby the appellant undertook to do that work. It is necessary to define the extent of the duty owed by the appellant to the respondent, on which the respondent seeks to make the appellant vicariously responsible for the negligence of

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the servant of an independent contractor. It is, I think, of the utmost importance to remember that, even adopting the first inference, the services of the independent contractor were retained by the appellant, not to perform work which the appellant was itself obligated to perform, but solely to do work which the respondent required to be done.

This is not the usual case in which the claimant is a person who has suffered damage as a result of activities being carried on by another person who has delegated their performance to an independent contractor. Nor does the respondent claim against the appellant in contract on the basis that it undertook to perform the work in question for the respondent and delegated that performance to the independent contractor. This being so, the issue must be as to the extent of the duty owed to a claimant by a person who contracts with an independent contractor to do work, not for himself, but for the claimant, at the claimant's request, if the claimant's own property is then damaged because of negligence on the part of the independent contractor who is working on it. The only connection of the appellant with the matter was the actual hiring of the services of the independent contractor and providing him with the necessary staging from which to do the work. What duty, in these circumstances, does the appellant owe to the respondent?

In my opinion, that duty was no more than to exercise reasonable care in the selection of a competent independent contractor to perform the work. There is no suggestion in the evidence that the choice made by the appellant was an improper one and, therefore, there is no evidence of a breach of that duty.

For the foregoing reasons, in my opinion, the appeal should be allowed and the judgment of the learned trial judge restored, with costs to the appellant throughout.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Parkinson, Gardiner, Roberts, Anderson, Conlin & Fitzpatrick, Toronto.

Solicitor for the plaintiff, respondent: G. S. Black, Halifax.

MODERN CONSTRUCTION LIMITED (*Plaintiff*) ..... APPELLANT;

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*Feb. 22

June 24

AND

MARITIME ROCK PRODUCTS LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Mechanics' liens—Whether last work done under contract performed within 45 days of filing of lien as required by statute—Interest in lands—Mechanics' Lien Act, R.S.N.S. 1954, c. 171, s. 23.

The plaintiff, a general construction company, entered into a contract whereby it agreed among other things to repair and extend a causeway and convert a ship into a wharf at a certain property where the defendant was carrying on the business of quarrying, selling and shipping stone. It was provided that the work would be substantially completed by June 1 so that the defendant would have its plant and wharf ready for the opening of the shipping season, and a list of the drawings and specifications was set out in the contract. By June 16 the wharf and causeway were temporarily operational. The substantial amount of work that remained to be done in order to bring the contract to completion was started on September 6 and completed on September 27. The plaintiff filed a mechanics' lien on October 17 and brought an action to enforce its claim. At the close of the plaintiff's case, the trial judge granted the defendant's motion for nonsuit on the ground that the last work proved to have been done under the contract was completed on June 16, and therefore not within 45 days of the filing of the lien, as required by s. 23 of the *Mechanics' Lien Act*, R.S.N.S. 1954, c. 171. The trial judgment having been affirmed on appeal, the plaintiff further appealed to this Court.

Held: The appeal should be allowed.

By the terms of the contract the plaintiff assumed an obligation to do everything indicated in the specifications and drawings which included sinking the ship complete with superstructure and extending the causeway to the ship. This work was not completed by providing temporary facilities which were not suitable to withstand the winter weather in the area. The evidence in the case constituted *prima facie* proof of the fact that the plaintiff had not done all that it promised to do under the contract until about September 27, and that the last work done by it thereunder was accordingly performed within 45 days of the registration of the lien. *County of Lambton v. Canadian Comstock Co. et al.*, [1960] S.C.R. 86, followed.

As to the defendant's contention that no *prima facie* case had been established to show that the defendant had any estate or interest in the lands described in the statement of claim, there was evidence to the effect that work was done and materials were supplied "in respect of" lands as to which there was some evidence of the defendant's interest. The validity of the lien was not destroyed by the fact that the descrip-

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

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MODERN CONSTRUCTION LTD. v. MARITIME ROCK PRODUCTS LTD.

tion in the statement of claim and claim for lien included together with those lands, certain Crown lands to which no lien attached.

Practice—Judgment granting motion for nonsuit reversed on appeal—Action referred back to trial judge.

The trial judge heard the defendant's motion for nonsuit in accordance with the submission of its counsel that he could be prejudiced if he was required to proceed before the Court decided on the issues raised. This left the defendant's counsel in a position where he was entitled to assume that he would be permitted to proceed if the motion were decided against him. In view of these circumstances it would be unjust for the defendant to be precluded from proceeding with its case, and it was therefore directed that the action be referred back to the trial judge so that the trial might proceed in the usual course. *McKee v. Fisher* (1929), 64 O.L.R. 634; *Hayhurst v. Innisfail Motors Ltd.*, [1935] 2 D.L.R. 272; *Cudworth v. Eddy*, [1927] 1 W.W.R. 583; *Protopappas v. B.C. Electric Ry. and Knap*, [1946] 1 W.W.R. 232; *Yuill v. Yuill*, [1945] P. 15, referred to.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *in banco*, affirming a judgment of McKinnon C.C.J., dismissing appellant's claim in a mechanics' lien action. Appeal allowed.

A. L. Caldwell, for the plaintiff, appellant.

A. R. Moreira, for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia *in banco* affirming a judgment rendered at trial by His Honour Judge A. H. McKinnon whereby he dismissed the appellant's claim for a lien under the *Mechanics' Lien Act*, R.S.N.S. 1954, c. 171, at the close of the appellant's case on the ground that the evidence then adduced did not establish a *prima facie* case to prove that the last work done under the contract upon which the claim is based was performed within 45 days of the filing of the lien on October 17, 1961, as required by the provisions of s. 23 of the said Act.

The claim is for work and labour done, services rendered and materials supplied by the appellant, which is a company engaged in the general construction business, under a contract dated April 20, 1961, whereby it agreed among other things to repair and extend a causeway and convert a ship into a wharf at a property situate at Malignant Cove, in the County of Antigonish, where the respondent was carrying on the business of quarrying, selling and shipping stone.

The making of this contract appears to have been first discussed at a meeting of the directors of the respondent company on April 16, 1961, at which representatives of the appellant were present. At this meeting it was disclosed that the respondent company, which has since become bankrupt, was in serious financial difficulties and that it was necessary for it to have its plant and wharf put in operational condition by the opening of the summer shipping season in June. It was reported also that the Nova Scotia Government had not yet made any final decision on the company's application for a loan of $100,000 "to take care of building a new wharf and to put the plant at Malignant Cove into operation", and it was pointed out that this decision might not be made until the middle of May whereas the work had to be done immediately. Some discussion followed concerning an offer by the appellant company to undertake the work forthwith, the upshot of which is perhaps best described in a letter written to the appellant by the respondent on April 20 which reads in part as follows:

> At a meeting of the Directors on April 15, 1961, it was proposed that Modern Construction Limited, Moncton, be granted a contract in the sum of $75,000 to carry out the construction of a wharf and certain repairs as per instructions which you already have, to the tunnel and conveyor of the Company's premises at Malignant Cove, construction operations to commence immediately and Modern Construction to wait until such time as Maritime Rock Products have completed proper financial arrangements for payment of this contract. It was further decided that if Modern Construction Limited would immediately commence operations and be prepared to await payment at a future date, then in consideration of this valuable service, Maritime Rock Products Limited would cause to be issued to Modern Construction Limited as a bonus, 78,948 shares of common capital stock of the Company at the purchase price of 5 cents per share.

The appellant having replied accepting this offer, a contract was prepared and executed by the parties on April 20 which included the following provisions:

> ARTICLE I. The Contractor will:
>
> (a) provide all the materials and perform all the work shown on the Drawings and described in the Specifications . . . which have been signed in duplicate by both parties . . .
>
> (b) do and fulfill everything indicated by this Agreement, the General Conditions of the Contract, the Specifications, and the Drawings, and
>
> (c) complete substantially as certified by the architect, all the work by the 1st day of June.

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Ritchie J.

ARTICLE II. The following is an exact list of the drawings and specifications referred to in Article I:

(a) carry out repairs to existing causeway and to extend causeway to ship,

(b) preparing ship for sinking, towing ship to site and sinking ship complete with superstructure.

(a) and (b) to be carried out as detailed on attached blueprints designated Schedules "A", "B" and "C".

* * *

It is understood that Maritime Rock Products Limited will supply all materials presently on site cost free to Modern Construction Limited, and it is further understood that Modern Construction Limited will supply all materials not otherwise located on the site.

ARTICLE III. The owner will:

(a) pay the contractor in lawful money of Canada for the materials and services aforesaid Seventy-five Thousand dollars ($75,000) subject to additions and deductions as provided in the General Conditions of the Contract.

No architect was engaged under the contract and the only provision with respect to the method of payment was that it would be made

on receipt of funds from Nova Scotia Government loan or the making of other satisfactory arrangements.

Work was commenced at the end of April or early in May 1961 and the evidence discloses that by June 16 the wharf and causeway were temporarily operational so that ships were able to come alongside and load the respondent's rock for the opening of the shipping season. It does not, however, appear that any further work was done during the summer months and the appellant's comptroller, the respondent's general manager, and the foreman on the job all testified that the substantial amount of work remaining to be done in order to bring the contract to completion was not started until September 6 and only completed on or about September 27.

None of this evidence is contradicted as the respondent's motion for nonsuit was granted at the close of the appellant's case on the ground that the last work proved to have been done under the contract was completed by June 16.

It is not disputed that under the provisions of s. 23 of the *Mechanics' Lien Act* the lien here in question was required to be registered within 45 days after the completion or abandonment of the contract but as has been indicated it is the appellant's contention that the work done in September

1961 was done pursuant to the contract and that registration of the lien on October 17 was therefore in conformity with the statutory requirements. The respondent, on the other hand, contends, as the Courts below have found, that the appellant's contractual obligation was completely fulfilled by having the shipping facilities available for transport and that this was done in the month of June and therefore more than 45 days before the registration of the lien.

In the course of his reasons for judgment, Judge McKinnon refers at length to the evidence of Mr. Ingalls, the appellant's comptroller, in which that witness agrees that the two principal items discussed at the directors' meeting of April 15 were that the respondent's wharf be made suitable for accommodating vessels and that the plant had to be made ready for the summer season. The learned trial judge quotes the following excerpts from the cross-examination of Mr. Ingalls regarding these two items:

> Q. Isn't it true that those were substantially done by the 19th of June of that year?
>
> A. The answer to that has to be a little indirect in that there was such a tremendous rush to get the plant into operation and take advantage of the shipping contract.
>
> Q. But those two necessary items we just discussed—they were completed June 19th.
>
> A. It was possible. I visited the site by that time and enough had been done that temporarily it was possible to operate the plant for shipping material. It would be shown the shipping date was very quickly achieved.
>
> Q. (by the Court): What is the answer to that question. The work contemplated by the agreement was completed by June?
>
> A. It was possible to begin shipping quickly on a basis that was almost temporary. The company had entered into the contract with Mussens of Canada whereby if the shipping was not moving there would be heavy penalties. It was possible to achieve shipping by that date.

The interpretation placed on the contract by Judge McKinnon appears to be based in large measure upon this evidence, as to which he states:

> It would appear to me that this evidence indicates the full purpose and extent of the contract. It was necessary to get the plant in operation and shipping facilities available for transport at some date in June, or the company would be subject to heavy penalties.

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Ritchie J.

That it was this concept which controlled the conclusion reached by the learned trial judge is shown by the following two paragraphs from his decision:

> It appears that the contract called for substantial compliance with the terms of the contract by June 1st and it would seem from the evidence herein that all the work contemplated by the contract was performed by the plaintiff by the early part of that month, and a careful review of the testimony of Mr. Ingalls, Mr. Chapman, as well as an examination of Schedules "A", "B" and "C" under the contract.
>
> In September, after the conclusion of the shipping season, the plaintiff proceeded to do further work on the causeway and boat although he must have been fully aware that he had no prospect of payment from the proceeds of a Nova Scotia Government loan as provided in the contract or, as it may be fairly assumed, from any other source. In view of this, it can well be that the defendant has some cause to contend that the plaintiff was simply securing the ship and causeway against the heavy winter weather to be expected in this area and this work had no connection with the purpose for which the contract was entered into.

With the greatest respect, it appears to me from a consideration of the terms of the contract itself that the appellant had thereby assumed an obligation to do everything indicated in the specifications and drawings which included sinking the ship *complete with superstructure* and extending the causeway to the ship and that this work was not completed by providing temporary facilities which were not suitable to withstand the winter weather in the area. It was no doubt recognized by all concerned with the project that it was necessary for the respondent to have its wharf and causeway in operational condition by the opening of the summer shipping season and it could be inferred from the evidence that the appellant had agreed to bring this about but this does not, in my opinion, justify the further inference that no more work was to be done under the contract or that the wharf and causeway were intended to be temporary structures only.

Mr. Chapman, to whose evidence the learned trial judge refers, was the respondent's general manager and one of the signatories to the contract on its behalf. In the course of his evidence this witness was specifically directed to the contract specifications and the attached drawings, and after referring to them he stated that in the month of September "approximately 35-45% of the rock was yet to be placed in and around the boat and causeway and 15-20% piling had to be completed around the back of the boat" in order to complete

the work indicated by those documents. In my view, this evidence was admissible and constituted *prima facie* proof of work having been done under the contract in September 1961.

In affirming the decision of the learned trial judge, Mr. Justice MacQuarrie who delivered the reasons for judgment of the Supreme Court *in banco* had occasion to say that "the circumstances disclosed by the evidence in this case indicate the value and importance of the learned trial judge having seen and heard the witnesses. This Court considering all the circumstances should attach great weight to this opinion".

The value and importance of seeing and hearing the witnesses which is enjoyed by the trial judge and denied to an appellate court should never be underestimated, but in the present case as the evidence for the appellant is entirely uncontradicted and as I do not read the learned trial judge's reasons and conclusion as being inconsistent with his having believed this evidence I do not, with respect, feel that this Court is under the same disadvantage as is the case where there is some conflict of evidence or some indication that the demeanour of the witnesses has affected the result. As I interpret the decision of the trial judge, it is based upon his construction of the contract and the fact that he differs in this regard from some of the witnesses does not, in my opinion, indicate that he was influenced by their demeanour.

In holding that "the September work does not confer or revive any lien", Mr. Justice MacQuarrie made reference to the case of *County of Lambton v. Canadian Comstock Company Ltd. et al.*[1] In that case, Judson J., speaking on behalf of this Court, with respect to s. 21(1) of the Ontario *Mechanics' Lien Act,* said at pp. 93-4:

> The fact that a contractor, who has substantially completed his work, may sue for the contract price, subject to deductions for minor defects or omissions, if there are any, does not and cannot determine when time begins to run against him under *The Mechanics' Lien Act*. Completion means what it says. I do not think that time begins to run under s. 21(1) until it can be said that the contractor or sub-contractor has done all that he promised to do and is entitled to maintain his account for the full amount.

[1] [1960] S.C.R. 86.

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Ritchie J.

In my opinion, this language applies with equal force to s. 23 of the Nova Scotia *Mechanics' Lien Act* and as I have indicated, the evidence in the present case appears to me to constitute *prima facie* proof of the fact that the appellant had not done "all that it promised to do" under the contract here in question until about September 27, 1961, and that the last work done by it thereunder was accordingly performed within 45 days of the registration of the lien on October 17.

This does not, however, dispose of this appeal as the respondent's motion for nonsuit was also based on the ground that no *prima facie* case had been established to show that the respondent had any estate or interest in the lands described in the statement of claim, or that the appellant had contracted to do any work on those lands, or that the amount claimed was owed with respect to work performed thereon.

The lands described in the statement of claim are said to be situate "at or near Malignant Cove, in the County of Antigonish, and to border on the highway leading from Georgeville to Malignant Cove". This description includes "a certain causeway", "the conveyor to the causeway", and "the hull of a sunken ship", and while denying that it is "the registered owner of the lands" the respondent pleaded, by para. 4(*f*) of its defence:

> In the further alternative, that the bankrupt is not the owner of the lands and premises referred to . . . but is entitled only to the equity of redemption in certain portions thereof, the same (in so far as the bankrupt has any interest therein) being subject to a mortgage the holder whereof is the owner of the legal estate and fee simple in the said lands and premises.

In the course of his evidence, Mr. Chapman was asked where the causeway on which the work was done was located, and he replied "off the causeway and wharf adjacent to the plant and situate at Georgeville, Malignant Cove, Antigonish area". It will be remembered also that in its letter of April 20 the respondent described the work to be done as "to carry out the construction of a wharf and certain repairs . . . to the tunnel and conveyor to the company's premises at Malignant Cove . . .".

The attitude adopted by the appellant is made plain in its factum, where it is said:

> The estate or interest of the defendant in the lands described in the statement of claim is of two kinds:
>
> (1) actual possession of the causeway and ship located on lands of the Crown, and
>
> (2) the holder of the equity of redemption in the remaining lands described in the statement of claim and claim for lien.

As to the lands other than the Crown lands, although the proof is slim indeed I do not think that it can be said that there is no evidence of the respondent having an estate or interest therein capable of being the subject of a mechanics' lien.

The respondent, which held itself out to be the owner of these lands when the contract was made and accepted the work and labour on that basis, is at a grave disadvantage when, having called no evidence to disprove its estate or interest in such lands, it seeks to have the action dismissed on the ground that no such estate or interest has been shown to exist. Under such circumstances, the Court is, in my opinion, entitled to resolve any doubts as to the respondent's interest in the lands in favour of the lien claimant.

As to the ship and causeway, I am not prepared to hold that mere possession without any claim or colour of right coupled with an admission that the lands in question belong to the Crown can give rise to an estate or interest in lands capable of being the subject of a mechanics' lien. In this regard, reference may usefully be had to the reasons for judgment rendered by Laidlaw J.A. on behalf of the Court of Appeal of Ontario in *Pankka v. Butchart et al.*[1]

It is, however, to be remembered that a lien attaches to "any estate or interest in the land upon *or in respect of which* the work or service is done or materials are placed or furnished . . ." (s. 1(*d*) and s. 5) and I am of opinion that there is some evidence to the effect that the work done and materials supplied to the wharf and causeway were done and supplied "in respect of" the remaining lands as to which there is some evidence of the respondent's interest, and I do not think that the validity of the lien is destroyed by the fact that the description in the statement of claim

[1] [1956] O.R. 837, 4 D.L.R. (2d) 345.

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and claim for lien includes together with those lands, certain Crown lands to which no lien attaches.

In conclusion, I should add that it appears to me that there was also some evidence that the amount claimed in the statement of claim was owed pursuant to work done under the contract hereinbefore referred to.

In view of all the above, I would allow this appeal and set aside the judgment of the Supreme Court *in banco* and of the learned trial judge.

In his factum, the appellant's counsel asks that judgment be entered for the relief claimed in the statement of claim but we did not hear argument on this phase of the matter and we were referred to no reported case, nor have I been able to find one, establishing the practice in Nova Scotia when a judgment granting a motion for nonsuit is reversed on appeal.

The practice under such circumstances appears to be well established in Ontario (see *McKee v. Fisher*[1]), Alberta (see *Hayhurst v. Innisfail Motors Ltd.*[2]), and in British Columbia (see *Cudworth v. Eddy*[3], and *Protopappas v. B.C. Electric Ry. and Knap*[4]), and is well described by Harvey C.J. in the *Hayhurst* case, *supra,* where he said at p. 277:

> . . . we see no reason why we should not apply the same rule of practice as that of Ontario. It is to be understood therefore that for the future when a defendant applies for a dismissal at the close of the plaintiff's case he does so at the risk of not having the right to give any evidence on his own behalf for if the trial Judge grants his application and the Appellate Court comes to the conclusion that it was wrong, it will feel itself at liberty to finally dispose of the case on the evidence already given and will do so *unless in its discretion it considers that in the interests of justice some other course should be taken.*

The English practice in this regard is discussed by Lord Greene in *Yuill v. Yuill*[5], where, after referring to *Laurie v. Raglan Building Co. Ltd.*[6], he goes on to say:

> The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of

[1] (1929), 64 O.L.R. 634, [1930] 2 D.L.R. 14.
[2] [1935] 2 D.L.R. 272.
[3] [1927] 1 W.W.R. 583 at 585, 37 B.C.R. 407.
[4] [1946] 1 W.W.R. 232, 2 D.L.R. 330, 62 B.C.R. 218.
[5] [1945] P. 15 at 18.
[6] [1942] 1 K.B. 152.

no case to his election, and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission.

In the present case, the learned trial judge explained his reasons for entertaining the respondent's motion for nonsuit on the following basis:

> It was further contended by the defendant that as none of these essentials were properly and sufficiently established, the case for the defendant could be prejudiced if he was required to proceed before the Court decided on the issues raised. Accordingly, decision was reserved and the trial adjourned until today . . .

It appears to me that the learned trial judge heard the respondent's motion in accordance with the submission of its counsel that he could "be prejudiced if he was required to proceed before the Court decided on the issues raised". In my view, this left the respondent's counsel in a position where he was entitled to assume that he would be permitted to proceed if the motion were decided against him.

In view of these circumstances, I am of opinion that it would be unjust for the respondent to be precluded from proceeding with its case and I would therefore direct that the action be referred back to the learned trial judge so that the trial may proceed in the usual course.

The appellant should have the costs of this appeal and of the appeal to the Supreme Court of Nova Scotia *in banco*. The costs of the trial, however, should abide the result thereof.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: A. L. Caldwell, Halifax.

Solicitor for the defendant, respondent: L. F. Daley, Halifax.

1963
May 21, 22
Oct. 1

LEO BLAIS, BISHOP OF PRINCE ALBERT, IN THE PROVINCE OF SASKATCHEWAN, EXECUTOR (*Defendant*) ..... APPELLANT;

AND

HONORE TOUCHET AND LUCIEN TOUCHET (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Charities—Gift to bishop for such works as would aid French Canadians of diocese—Whether bequest charitable.

The testator, a parish priest, by a holograph will written in French appointed his bishop as his executor and universal legatee and left him all his property "pour ses œuvres, mais pour les œuvres qui aideraient la cause des Canadiens français dans son diocèse". On an application to decide whether the bequest constituted a valid charitable trust, the trial judge held that the bequest was charitable. The Court of Appeal held that it was not. Both the trial judge and the Court of Appeal were of the opinion that the bishop did not take beneficially but as trustee and that by virtue of his office, the gift was limited to his charities or works arising from his religious responsibilities as the bishop. The trial judge held that by saying "mais pour les œuvres qui aideraient la cause des Canadiens français dans son diocèse", the testator was merely confining the charities within a certain field and that these were words of limitation in no way affecting the gift as a charity. The Court of Appeal held that these words enlarged the field of application of the bequest, and no longer made it imperative to apply it to purposes strictly charitable. An appeal from the decision of the Court of Appeal was brought to this Court.

Held: The appeal should be allowed.

The Court held that this particular gift to the bishop was charitable by virtue of his office and that the testator did not step outside the charitable field in imposing the limitation to work among French Canadians. *In re Garrad,* [1907] 1. Ch. 382; *In re Flinn,* [1948] 1 All E. R. 541; *In re Rumball,* [1956] Ch. 105, followed.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of McKercher J. Appeal allowed.

Hon. C. H. Locke, Q.C., and *D. G. Blair,* for the defendant, appellant.

J. G. Crepeau, for the plaintiffs, respondents.

*PRESENT: Taschereau C. J. and Cartwright, Abbott, Martland and Judson JJ.

[1] (1962), 38 W.W.R. 587, 34 D.L.R. (2d) 521.

The judgment of the Court was delivered by

JUDSON J.:—The question in this litigation is whether a certain disposition made in the will of the Reverend Father George Emile Touchet, parish priest at Duke Lake, Saskatchewan, dated August 14, 1955, is charitable. The will was in holograph form and written in French in the following words:

> Je désigne et nomme Son Excellence Mgr. Léo Blais, mon évêque, comme mon exécuteur et mon légataire universel. Je lui lègue donc tout ce que je possède de biens, (à part ce qui a déjà été prévu, donné et confié à M. Jules Couture ou son associé à 266 ouest St. Jacques, Montréal, P.Q.) à lui Mgr. Léo Blais, évêque de Prince Albert, pour ses œuvres, mais pour les œuvres qui aideraient la cause des Canadiens Français dans son diocèse.

The following literal translation into English was accepted by the Court of Appeal:

> I designate and appoint His Excellency Mgr. Leo Blais, my Bishop, as my Executor and my universal Legatee. I therefore give and bequeath to him all the property that I own (except that which has already been provided for, given and entrusted to Mr. Jules Couture or his associate at 266 St. James West, Montreal, P.Q.) to him Mgr. Leo Blais, Bishop of Prince Albert, for his works, but for such of the works as would aid the cause of the French Canadians of his diocese.

In the translation attached to the Letters Probate issued on December 15, 1959, "œuvres" is translated "charities" on each occasion of its use. In the translation accepted by the Court of Appeal it is literally translated as "works". McKercher J. held that the bequest was charitable. The Court of Appeal[1] held that it was not. The conflict is not as direct as the result might suggest. Both McKercher J. and the Court of Appeal were of the opinion that the bishop did not take beneficially but as trustee and that by virtue of his office, the gift was limited to his charities or works arising from his religious responsibilities as the bishop. McKercher J. held that by saying "mais pour les œuvres qui aideraient la cause des Canadiens français dans son diocèse", the testator was merely confining the charities within a certain field and that these were words of limitation in no way affecting the gift as a charity.

The Court of Appeal differed on this one point. They held that these words enlarged the field of application of the bequest, and no longer made it imperative to apply it to purposes strictly charitable.

[1] (1962), 38 W.W.R. 587, 34 D.L.R. (2d) 521.

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BLAIS v. TOUCHET

Judson J.

As a matter of construction, I cannot adopt this view. To me the construction put upon the bequest by McKercher J. is the correct one. Our task is to determine what this testator meant. He was an educated man and writing in his mother tongue. His bequest was to his bishop as trustee for certain purposes. This bequest to the bishop by virtue of his office is held to be charitable in both Courts. We must assume that the testator knew what he was doing, that he knew the meaning of his own words and the religious responsibilities of the bishop. Dictionary definitions recognize the use of "œuvre" in this context. I quote from:

(*a*) Larousse du XX^e^ Siècle:

> Admin. Ecclés. Fabrique d'une paroisse, revenu affecté à la construction, à la réparation des bâtiments, à l'achat et à l'entretien des objets nécessaires au service divin.

(*b*) Littré, Dictionnaire de la Langue française, Tome 5, (1957):

> En un sens plus restreint, bonnes œuvres, les charités que l'on fait, soit pour soulager les pauvres, soit pour des fondations pieuses ou charitables.

(*c*) Bélisle, Dictionnaire général de la Langue française au Canada:

> Toute sorte d'actions morales. Bonnes œuvres, actions inspirées par une morale pure et active; les charités que l'on fait.

With this well-recognized meaning of the word in the French language and its use in a will by a French-speaking parish priest who knew what he was writing about, it would, in my opinion, be error to hold that because he mentioned the application of the bequest in the terms above quoted, among French Canadians in the diocese, by so doing he stepped outside the charitable field.

This problem is one of construction in each particular case. Fine distinctions have been made from time to time and it is not always easy to see why in one case a court would decide that a case fell on the charitable side of the line and in another case on the non-charitable side. Evershed M.R. in *In re Rumball*[1] reviewed all the recent litigation where these problems have arisen. The following is his summary in one of the opening paragraphs of his judgment:

> Questions of this kind are notoriously difficult and, no doubt, the distinctions illustrated by the cases appear at times very fine. Thus, a gift to the vicar and churchwardens of a particular parish "for such uses as they shall, in their sole discretion, think fit"; and a gift "to His

[1] [1956] Ch. 105, [1955] 3 All E. R. 71.

Eminence the Archbishop of Westminster Cathedral, London, for the time being to be used by him for such purposes as he shall, in his absolute discretion, think fit" have been held to be good charitable gifts (*In re Garrard,* [1907] 1 Ch. 382, and *In re Flinn,* [1948] 1 All E. R. 541). But a gift to the Archbishop of Brisbane for such purposes "as the Archbishop may judge most conducive to the good of religion in this diocese" has been held by the Privy Council to be bad (*Dunne v. Byrne,* [1912] A.C. 407). Again, a gift to a vicar "for parish work" has been held bad by the House of Lords in *Farley v. Westminster Bank* [1939] 3 All E.R. 491; but a gift to a vicar to be used by him as he should think fit "for his work in the parish" was held in 1946 by Romer J. to be good (*In re Simson,* [1946] 2 All E.R. 220); and in *In re Beddy* in 1953, unreported, where the words of the gift bore a resemblance (at least) to those in the present case—for they were a gift "to the Roman Catholic prelate who shall be Archbishop of Westminster at the time of my death, to use for such purposes in the diocese as he may choose"—Harman J., expressing himself as not willing to add to the fineness of the distinctions already made, held the gift to be bad.

A recent author, Keeton in The Modern Law of Charities (1962) p. 65, has commented that this branch of the law of charities is suffering from over-technicality. I join with others who have said that they do not wish to add to it. I therefore follow the line of reasoning in *In re Garrad, In re Flinn* and *In re Rumball* and hold that this particular gift to the bishop is charitable by virtue of his office and that the testator did not step outside the charitable field in imposing the limitation to work among French Canadians.

I would allow this appeal and restore the judgment of McKercher J. In the circumstances, I would direct that the costs of both parties, here and in the Court of Appeal, be paid out of the estate, those of the executor as between solicitor and client.

Appeal allowed.

Solicitors for the defendant, appellant: Cuelenaere & Hall, Prince Albert.

Solicitors for the plaintiffs, respondents: Crepeau & Simonot, Prince Albert.

1963
*May 6, 7, 8
Oct. 2

DOMINION BRIDGE COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

TORONTO GENERAL INSURANCE COMPANY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Insurance—Contractor's public liability policy—Coverage for "liability imposed by law"—"Liability assumed under contract" excluded—Liability of insured tortious liability independently of contract—Whether claim within exclusion clause.

The plaintiff company contracted with a Toll Bridge Authority to construct the steel superstructure of a bridge, the piers of which had already been erected by the Authority. The defendant insurance company issued to the plaintiff a "Contractors Public Liability Policy". Endorsement No. 1 of the policy provided for the payment of "all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of injury to or destruction of property, caused by accident . . .". It further provided that "this endorsement shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of . . . (1) liability or obligation assumed by the insured under any contract or agreement . . .". As the result of faulty design and miscalculation, portions of the uncompleted superstructure collapsed upon and seriously damaged two of the piers. Under the contract, the plaintiff assumed all responsibility for loss or damage to any portion of the bridge structure, arising out of faulty work or faulty design on its part. The plaintiff admitted that the accident resulted from its negligence and accepted liability and then claimed against its insurer.

The trial judge held that the above exclusion clause only excluded liability arising from contract and not claims arising out of concurrent liability in tort. The Court of Appeal held that the liability in question had been assumed by the plaintiff under its contract with the Bridge Authority and that it came squarely within the exclusion and that it was immaterial that such liability was tortous liability independently of contract. "Liability imposed by law" and "liability assumed under contract" were for one and the same loss. That being so, liability, even though imposed by law, was excluded from the coverage. From this decision the plaintiff appealed to this Court.

Held: The appeal should be dismissed.

For the reasons given by the Court of Appeal, the Court held that the present claim was within the exclusion clause. *The Canadian Indemnity Co. v. Andrews & George Co. Ltd.*, [1953] 1 S.C.R. 19, followed; *Featherstone v. Canadian General Insurance Co.*, [1959] O.R. 274, disapproved.

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Judson JJ.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Collins J. Appeal dismissed.

J. J. Robinette, Q.C., and *J. A. Ogilvy, Q.C.*, for the plaintiff, appellant.

D. McK. Brown, Q.C., and *A. D. McEachran*, for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Dominion Bridge Company Limited sued the Toronto General Insurance Company for a declaration that it was entitled to indemnity in the sum of $358,102.81, being the agreed cost to Dominion Bridge of repairing damage to piers nos. 13 and 14 of the Second Narrows Bridge in Burrard Inlet caused on June 17, 1958, when span no. 4 and partially constructed span no. 5 of the steel superstructure of the bridge collapsed. The trial judge gave judgment in favour of Dominion Bridge for the agreed sum. The Court of Appeal[1] reversed this judgment on the ground that the liability in question came within the exclusion clause in the insurance policy on which the action was brought. Dominion Bridge now seeks restoration of the judgment given at the trial.

On August 7, 1957, Dominion Bridge contracted with the British Columbia Toll Highways and Bridges Authority to construct the steel superstructure of Second Narrows Bridge to connect the City of Vancouver with the north shore of the Burrard Inlet. The concrete piers upon which the superstructure was to be placed had already been erected by the Authority but it was the duty of Dominion Bridge to erect any temporary supports, called in the evidence "falsework". Under the contract, Dominion Bridge assumed all responsibility for loss or damage to any portion of the bridge structure, which would include the piers, arising out of faulty work or faulty design on its part. Due to faulty design and miscalculation, the falsework buckled and caused portions of the uncompleted superstructure to collapse upon and seriously damage the piers. Dominion Bridge admitted that the accident resulted from its negligence and accepted liability and then claimed against its insurer.

[1] (1962), 37 W.W.R. 673, 32 D.L.R. (2d) 374.

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DOMINION BRIDGE CO. LTD. v. TORONTO GENERAL INSURANCE CO.

Judson J.

The insurance company issued what is called a "Contractors Public Liability Policy" for all damages arising out of bodily injury, sickness, disease or death caused by an accident resulting from the work or operations. This was subject to an exclusion of the liability of the insured under the workmen's compensation law and for injuries to employees of the insured arising out of and in the course of the employment. We are not concerned with this aspect of the policy but with endorsement number 1 which is called "Contractors Property Damage Endorsement".

The relevant parts of endorsement 1 read:

> In consideration of an additional premium and subject to the Statements, Exclusions and Special Conditions, hereby further agrees with the Named Insured:
>
> A. To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law for damages because of injury to or destruction of property, caused by accident occurring within the Policy Period and while this Endorsement is in force and resulting from or while at or about the work or operations of the Insured designated as an insured risk under a Section or Sections of Statement 4.
>
> This Endorsement shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of any of the following matters: (1) liability or obligation assumed by the Insured under any contract or agreement; (2) injury to or destruction of (a) property used, owned or occupied by, rented or leased to, or in the care, custody or control of, the Insured . . .

The trial judge held that the first exclusion clause only excluded liability arising from contract and not claims arising out of concurrent liability in tort. The Court of Appeal held that the liability in question had been assumed by Dominion Bridge under its contract with the Bridge Authority and that it came squarely within the first exclusion clause and that it was immaterial that such liability was tortious liability independently of contract. "Liability imposed by law" and "liability assumed under contract" were for one and the same loss. That being so, liability, even though imposed by law, was excluded from the coverage.

I agree with and adopt the unanimous opinion of the Court of Appeal on this point based as it is on the applica-

tion of the judgment of this Court in *The Canadian Indemnity Co. v. Andrews & George Co. Ltd.*[1] and their rejection of the interpretation put on this judgment by the learned trial judge, who had founded his judgment on *Featherstone v. Canadian General Insurance Co.*[2]. In my respectful opinion, there is direct conflict between the judgment of the learned trial judge in this case and the judgment of the Ontario Court of Appeal in the *Featherstone* case on the one hand and the judgment of this Court in *Andrews & George,* and for the reasons given in the judgment under appeal, I would hold that the present claim is within the first exclusion.

It is unnecessary to deal with the second exclusion clause which excludes liability if there is injury to or destruction of (a) property used, owned or occupied by, rented or leased to, or in the care, custody or control of, the insured. The learned trial judge held against this exclusion. In this he was supported in the Court of Appeal in the reasons for judgment of the learned Chief Justice. Sheppard J. A., however, held that the use made of the piers by Dominion Bridge in order to erect its superstructure and as part of its method of construction, constituted such piers "property used by the Insured". He therefore held that liability for the damage to these piers was also excluded by the second clause. Davey J.A. expressed no opinion.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Harper, Gilmour, Grey, de Vooght & Levis, Vancouver.

Solicitors for the defendant, respondent: Russell & DuMoulin, Vancouver.

[1] [1953] 1 S.C.R. 19, [1952] 4 D.L.R. 690.

[2] [1959] O.R. 274, 18 D.L.R. (2d) 227.

1963
*May 9,10
Oct. 2

UNITED STATES OF AMERICA (*Plaintiff*) ..... APPELLANT;

AND

ESPERANZA P. HARDEN (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Conflict of laws—Rule that foreign States cannot directly or indirectly enforce their tax claims in our courts not affected by taking of judgment in foreign States—Stipulation judgment—Liability to pay tax not converted into contractual obligation.

The plaintiff issued a writ of summons against the defendant in the Supreme Court of British Columbia. The claim was upon a judgment of the United States District Court for the Southern District of California, the judgment being in respect of a claim for taxes. As a result of pre-trial hearings it was stipulated that judgment might be entered against the defendant for a stated amount, which was less than the amount originally claimed, and pursuant to this stipulation judgment was entered. An application to set aside the writ and all subsequent proceedings was granted by the judge who heard the motion on the ground that the action was an attempt to enforce the revenue laws of a foreign State. This judgment was upheld unanimously by the Court of Appeal. An appeal from the decision of the Court of Appeal was brought to this Court.

Held: The appeal should be dismissed.

A foreign State cannot escape the application of the rule that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country, which is one of public policy, by taking a judgment in its own courts and bringing suit here on that judgment. The claim asserted remains a claim for taxes. It has not, in our courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim.

Similarly, the argument that the claim asserted was simply for the performance of an agreement, made for good consideration, to pay a stated sum of money also failed. The Court was concerned not with form but with substance, and if it could properly be said that the defendant made an agreement it was simply an agreement to pay taxes which by the laws of the foreign State she was obligated to pay.

Neither the foreign judgment nor the agreement did more than make certain the fact and the amount of the defendant's liability to the plaintiff. The nature of the liabiliy was not altered. It was a liability to pay income tax.

As to the argument that the judge of first instance ought not to have set aside the writ but should have directed that the action proceed to trial, the Court agreed with the view of the judge that it was clear that all the relevant facts were before the Court and nothing

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

would have been gained by directing that the action proceed to trial.

Government of India, Ministry of Finance (Revenue Division) v. Taylor, [1955] A.C. 491; *Peter Buchanan Ld. & Macharg v. McVey*, [1955] A.C. 516, applied.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from an order of Maclean J. Appeal dismissed.

J. J. Robinette, Q.C., and *J. G. Alley*, for the plaintiff, appellant.

J. W. de B. Farris, Q.C., and *J. M. Giles*, for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] dismissing an appeal from an order of Maclean J. which set aside the writ of summons issued by the appellant against the respondent and all subsequent proceedings.

The writ was issued in the Supreme Court of British Columbia on March 20, 1961. It was specially endorsed. The claim was "upon a judgment of the United States District Court for the Southern District of California, Central Division, in the United States of America dated and filed the 10th day of March, 1961, and entered the 13th day of March, 1961". The amount claimed in Canadian currency was $602,919.10.

By order dated May 4, 1961, Collins J. gave leave to the respondent to enter a conditional appearance. This order provided that any appearance entered by the respondent should be unconditional unless application were made within ten days to set aside the writ of summons. A motion to set aside the writ and all subsequent proceedings was made within the time limited. On the return of the motion affidavits were read on behalf of both parties and there is no dispute as to the relevant facts.

On June 10, 1957, an action was commenced in the United States District Court for the Southern District of California, alleging that the respondent was indebted for taxes

[1] (1962), 40 W.W.R. 428, 36 D.L.R. (2d) 602.

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for the year 1945 in the sum of $264,117.23 and for the year 1946 in the sum of $603,844.78. The respondent through her attorney-at-law filed an answer alleging that the deficiency for income tax for the year 1945 was the sum of $96,040.27 and denying that there was any liability for tax for the year 1946.

As a result of pre-trial hearings before a district judge it was stipulated that judgment might be entered against the respondent for the sum of $200,037.28 in respect of the year 1945 being the sum of $96,040.27 and interest to March 10, 1961, and for the sum of $439,462.87 in respect of the year 1946 being $219,557.96 and interest to March 10, 1961.

Pursuant to this stipulation judgment was signed on March 10, 1961, and entered on March 13, 1961; an exemplification is produced as Exhibit "A" to an affidavit filed on behalf of the appellant. It consists of a single document headed "Stipulation for Judgment and Judgment" and shews on its face that it is for taxes assessed upon the income of the respondent for the years 1945 and 1946 for which the respondent is indebted to the appellant, together with interest thereon to the date of the judgment. The judgment as signed orders that the plaintiff recover against the defendant $609,500.15. The obvious error in addition was corrected by a subsequent "Stipulation and order re amendment of judgment" to make the judgment read $639,500.15 in place of $609,500.15.

The respondent has paid nothing on account of the judgment and is now resident in the Province of British Columbia.

The ground set up in the notice of motion to set aside the writ reads: "that this Court has no jurisdiction to entertain the claim endorsed thereon".

At the conclusion of the argument of the motion before Maclean J., which occupied three days, that learned judge gave judgment orally setting aside the writ on the ground that the action was an attempt to enforce the revenue laws of a foreign State; he later delivered written reasons examining in detail the arguments of counsel for the appellant and a number of authorities. His judgment was upheld by a unanimous judgment of the Court of Appeal the reasons for which were delivered by Sheppard J.A.

Counsel inform us that there is a mistake of fact in the reasons of Sheppard J.A. when, speaking of the proceedings before Maclean J., he says: "After preliminary objection, it was agreed that the motion be dealt with as a motion for judgment", and that what actually occurred is correctly stated in the following passage in the reasons of Maclean J.:

> During the hearing of the preliminary objection counsel for the plaintiff offered to agree to proceed with this motion as a motion for judgment upon a point of law if the defendant would consent to file an unconditional appearance. This offer was not accepted.

It is suggested that this is relevant to the third point argued before us on behalf of the appellant, to which reference will be made later.

Neither in this Court nor in the Courts below did counsel for the appellant question the well-established general rules (i) that a foreign State is precluded from suing in this country for taxes due under the law of the foreign State, and (ii) that in a foreign judgment there is no merger of the original cause of action. Ample authority for both of these propositions is to be found in the reasons of Sheppard J.A.

Three arguments were put forward in support of the appeal.

First, it was submitted that although a claim for taxes made by a foreign State would not be entertained in the courts of this country a judgment for payment of those taxes obtained in the courts of the foreign State will be enforced here.

Secondly, it was submitted that the courts of this country will enforce an agreement by way of compromise made for valuable consideration to pay an amount of money in satisfaction of a claim for foreign taxes.

Thirdly, it was submitted that, in any event, the learned judge of first instance ought not to have set aside the writ but should have directed that the action proceed to trial.

In my opinion all these submissions were rightly rejected by the Courts below.

The rule that the courts of this country will not entertain a suit by a foreign State to recover a tax has been restated recently by the House of Lords in *Government of India,*

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Ministry of Finance (Revenue Division) v. Taylor[1]. At p. 503, Viscount Simonds adopted the following passage from the judgment of Rowlatt J. in *The King of the Hellenes v. Brostron*[2]:

> It is perfectly elementary that a foreign government cannot come here—nor will the courts of other countries allow our Government to go there—and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs.

At p. 504, Viscount Simonds also adopted the following from the judgment of Tomlin J., as he then was, in *In re Visser, The Queen of Holland v. Drukker*[3]:

> My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain.

Various reasons have been suggested for this ancient rule. In his speech in *Government of India, Ministry of Finance (Revenue Division) v. Taylor, supra,* Lord Keith of Avonholm having approved of the judgment of Kingsmill Moore J. in the High Court of Eire in *Peter Buchanan Ld. & Macharg v. McVey,* reported as a note in [1955] A.C. 516, and particularly of the proposition "that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country", goes on at pp. 511 and 512 to suggest two explanations, as follows:

> One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties. Another explanation has been given by an eminent American judge, Judge Learned Hand, in the case of *Moore v. Mitchell,* in a passage, quoted also by Kingsmill Moore J. in the case of *Peter Buchanan Ld* as follows: 'While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign State, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens

[1] [1955] A.C. 491. [2] (1923), 16 Ll. L. Rep. 190 at 193.
[3] [1928] Ch. 877 at 884.

or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.'

On either of the explanations which I have just stated I find a solid basis of principle for a rule which has long been recognized and which has been applied by a consistent train of decisions. It may be possible to find reasons for modifying the rule as between States of a federal union. But that consideration, in my opinion, has no relevance to this case.

In the same case, at p. 515, Lord Somervell of Harrow recognizes and applies "the special principle that foreign States cannot directly or indirectly enforce their tax claims here".

In my opinion, a foreign State cannot escape the application of this rule, which is one of public policy, by taking a judgment in its own courts and bringing suit here on that judgment. The claim asserted remains a claim for taxes. It has not, in our courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim.

Similarly, in my opinion, the argument that the claim asserted is simply for the performance of an agreement, made for good consideration, to pay a stated sum of money must also fail. We are concerned not with form but with substance, and if it can properly be said that the respondent made an agreement it was simply an agreement to pay taxes which by the laws of the foreign State she was obligated to pay.

Neither the foreign judgment nor the agreement does more than make certain the fact and the amount of the respondent's liability to the appellant. The nature of the liability is not altered. It is a liability to pay income tax.

The views, (i) that the application of the rule that foreign States cannot directly or indirectly enforce their tax claims in our courts is not affected by the taking of a judgment in the foreign State, and (ii) that the liability to pay tax does not become converted into a contractual obligation, both appear to me to be supported by the following passage in the speech of Lord Somervell of Harrow in *Government of*

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India, Ministry of Finance (Revenue Division) v. Taylor, supra, at pp. 514 and 515:

> If one State could collect its taxes through the courts of another, it would have arisen through what is described, vaguely perhaps, as comity or the general practice of nations inter se. The appellant was therefore in a difficulty from the outset in that after considerable research no case of any country could be found in which taxes due to State A had been enforced in the courts of State B. Apart from the comparatively recent English, Scotch and Irish cases there is no authority. There are, however, many propositions for which no express authority can be found because they have been regarded as self-evident to all concerned. There must have been many potential defendants.
>
> Tax gathering is an administrative act, though in settling the quantum as well as in the final act of collection judicial process may be involved. Our courts will apply foreign law if it is the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction. If one considers the initial stages of the process, which may, as the records of your Lordships' House show, be intricate and prolonged, it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of State A. Once a judgment has been obtained and it is a question only of its enforcement the factor of time and expense will normally have disappeared. The principle remains. The claim is one for a tax.
>
> The fact, I think, itself justifies what has been clearly the practice of States. They have not in the past thought it appropriate to seek to use legal process abroad against debtor taxpayers. They assumed, rightly, that the courts would object to being so used. The position in the United States of America has been referred to, and I agree that the position as between member States of a federation, wherever the reserve of sovereignty may be, does not help.

That it is the duty of our courts to go behind the foreign judgment to ascertain the substance of the claim on which it is based is made plain by the reasons of Sheppard J.A. and the authorities to which he refers.

For the reasons given by Sheppard J.A. and those I have stated above I would reject the first two arguments urged in support of the appeal.

As to the third argument, I agree with the view of Maclean J. that it is clear that all the relevant facts were before the Court and nothing would have been gained by directing that the action proceed to trial. On this point I would adopt the reasoning of Kingsmill Moore J. in *Peter Buchanan Ld & Macharg v. McVey, supra,* at p. 529 where he says:

> For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign

revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

Solicitors for the defendant, respondent: Farris, Stultz, Bull & Farris, Vancouver.

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JEAN-MARIE SAMSON (*Défendeur*) .....APPELANT;

ET

DAME ISSIE HOLDEN ET AUTRES (*Demandeurs*) ..... } INTIMÉS.

1962

*Oct. 17, 18

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Jan. 22

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUEBEC

Conflit de lois—Loi étrangère—Quasi-délit—Accident fatal dans l'État du Maine—Victime y domiciliée—Défendeur domicilié dans la Province de Québec—Action prise dans Québec par la veuve et les enfants personnellement—Loi du Maine exigeant qu'une telle action soit prise par l'administrateur de la succession—Question de procédure ou de substance—Validité de l'action—Code Civil, art. 1056—Code de Procédure Civile, arts. 174 et seq.

Une automobile, conduite par son propriétaire, le défendeur, dont le domicile était dans la Province de Québec, a frappé et mortellement blessé dans l'État du Maine un résident de cet État. La veuve et les deux fils majeurs de la victime poursuivirent personnellement dans la Province de Québec pour réclamer des dommages. En vertu de la loi du Maine, une telle action, lorsque la victime décède *ab intestat* comme dans le cas présent, doit être prise par et au nom de l'administrateur de la succession. Un des fils avait été nommé administrateur, mais il s'est porté demandeur avec les autres comme bénéficiaire et non comme administrateur. Le juge de première instance a conclu à la responsabilité du défendeur et à la validité de l'action telle que prise. En Cour d'Appel, la responsabilité du défendeur a été unanimement retenue et cette question n'a pas été débattue devant la Cour suprême. La majorité des juges de la Cour d'Appel se sont prononcés en faveur de la validité de l'action. Le défendeur en a appelé de ce jugement.

Arrêt: L'appel doit être rejeté, le Juge Taschereau dissident.

Le Juge en chef Kerwin et les Juges Cartwright, Fauteux et Abbott: En vertu du droit international privé de Québec—lieu où le litige a été

*CORAM: Le Juge en chef Kerwin et les Juges Taschereau, Cartwright, Fauteux et Abbott.

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soumis—l'accident était selon les dispositions du *Code Civil* un acte actionnable comme quasi-délit dans Québec et selon la loi du Maine un acte actionnable ou punissable dans le Maine. Cet accident a donc donné, au bénéfice des demandeurs, dans Québec, un droit d'action en dommages contre le défendeur.

Suivant ce même droit international privé, la question de savoir si les demandeurs pouvaient poursuivre personnellement doit être considérée comme une question de procédure n'affectant pas la substance du droit donné aux demandeurs par la loi *lex loci delicti.*

La prépondérance de la preuve sur la loi du Maine établit que la prescription voulant que l'action soit portée par et au nom du représentant personnel en est aussi une de procédure. Cette disposition n'a que pour seule fin que d'assurer qu'il n'y ait qu'une seule action et que tous les bénéficiaires y soient mentionnés. Les demandeurs ici sont tous et seuls bénéficiaires du droit d'action créé par la loi du Maine. Il s'en suit que vu que c'est la procédure du for qui régit, on doit conclure à la validité de l'action poursuivie conformément à cette procédure.

Le Juge Taschereau, *dissident*: En vertu de l'art. 6 du *Code Civil,* les lois qui règlent l'état et la capacité des personnes ne s'appliquent pas à celui qui n'est pas domicilié dans la province. Comme les demandeurs personnellement n'avaient pas la qualité ni la capacité de poursuivre dans le Maine, ils ne pouvaient donc pas instituer une action ici et se substituer à l'administrateur qui seul est investi de ce droit. Il ne s'agit pas ici d'une question de procédure, mais d'un droit fondamental—le droit de plaider. Même s'il s'agissait d'une question de procédure, c'est la procédure de Québec—lieu du procès—qui s'appliquerait; et en vertu de notre loi aucun amendement ne peut être admis pour substituer un demandeur à un autre. Il n'était pas nécessaire de soulever par exception à la forme cette absence de qualité des demandeurs, ceci pouvait être invoqué à tout autre stade de la procédure.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], affirmant un jugement de Marquis J. Appel rejeté, le Juge Taschereau dissident.

Robert Cannon, c.r., et *R. Drouin,* pour le défendeur, appelant.

R. Letarte, pour les demandeurs, intimés.

Le jugement du Juge en Chef Kerwin et des Juges Cartwright, Fauteux et Abbot fut rendu par

LE JUGE FAUTEUX:—Dans la soirée du 20 octobre 1952, Henry L. Holden, domicilié à Jackman dans l'État du Maine, y fut accidentellement et mortellement heurté par une automobile conduite par l'appelant sur la route 201. Il décéda le lendemain, laissant comme héritiers légaux immédiats sa veuve et ses deux fils, Milford R. Holden et Harold C. Holden, tous trois intimés en cet appel.

[1] [1961] B.R. 239.

Dans l'année du décès, soit le 14 octobre 1953, ces derniers, domiciliés aux États-Unis, poursuivirent l'appelant dans la province de Québec où celui-ci avait son domicile, pour lui réclamer $4,728.35 dont $728.35 pour frais d'hospitalisation, médicaux et funéraires et la somme de $4,000 pour dommages à être répartie entre eux dans la proportion déterminée par la Cour. Aux fins de cette action, les demandeurs invoquèrent particulièrement, mais sans aucune précision, la Loi du Maine «en tant qu'applicable à l'espèce» et produisirent, à la suite d'une ordonnance de la Cour, une procuration donnée à leur avocat, Me Robert Perron, par Milford R. Holden, l'un des demandeurs, en sa qualité d'administrateur nommé suivant la loi du Maine aux fins de ce recours en justice.

En défense, l'appelant plaida que la victime avait, par sa faute, rendu cet accident inévitable et ajouta que l'action était mal fondée en fait et en droit.

A l'enquête, on apporta une preuve circonstanciée de l'accident et de ses conséquences. On produisit de plus certains extraits de la Loi du Maine et, de part et d'autre, on fit entendre sur la portée de la loi de cet État des avocats y exerçant, et ce (i) tant sur la question de la responsabilité que (ii) sur celle de la validité d'une action similaire, eût-elle été intentée dans l'État du Maine par et au nom de ceux au bénéfice desquels elle y est autorisée, au lieu de l'être suivant une disposition de cette loi par et au nom de l'exécuteur testamentaire ou de l'administrateur nommé à ces fins, pour leur bénéfice.

Adjugeant sur le premier point, le Juge au procès trouva que le défendeur avait commis une faute causant l'accident en conduisant à une vitesse prohibée par la loi et en déviant vers la gauche pour aller heurter la victime avec violence, lui fracturer le crâne, les jambes, un bras et causer sa mort presque immédiate. Cette opinion, partagée en appel, n'a pas été remise en question devant nous par l'appelant.

Sur le second point, le Juge au procès eut d'abord à considérer les arts. 9 et 10 du chapitre 152 des Statuts Revisés du Maine, 1944, se lisant respectivement comme suit:

Section 9.—Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, in every such case,

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the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony.

Section 10.—Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action, except as hereinafter provided, shall be for the exclusive benefit of the widow or widower, if no children, and of the children, if no widow or widower, and if both, then for the exclusive benefit of the widow and widower and the children equally, and if neither, of his or her heirs. The jury may give such damages as they shall deem a fair and just compensation, not exceeding $10,000, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, and in addition thereto, shall give such damages as will compensate the estate of such deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, provided that such action shall be commenced within 2 years after the death of such person.

Le Juge apprécia en outre les témoignages contradictoires donnés sur la portée de la loi de cet État par Mes Wallace A. Bilodeau et Carl Wright, en demande, et par Me John L. Merrill, en défense. Sur le tout, il jugea que, suivant la prépondérance de la preuve, les dispositions prescrivant que l'action résultant d'un décès doit être intentée par un administrateur ou un exécuteur testamentaire sont matière de procédure; que la défense doit se plaindre du défaut de s'y conformer avant l'instruction au mérite par un plaidoyer préliminaire de la nature d'une exception à la forme ou d'une inscription en droit; qu'en matière de procédure, c'est la «*lex fori*» et non la «*lex loci delicti*» qui s'applique; que, dès lors, cette question doit être solutionnée, non pas d'après la Loi de l'État du Maine, mais selon celle de la province de Québec qui exige que, dans l'espèce, l'action soit—comme elle le fut—intentée au nom de la veuve et des deux fils du défunt. La Cour supérieure fit donc droit à l'action des demandeurs.

En Cour du banc de la reine[1], les Juges, d'accord, comme déjà indiqué, à retenir la responsabilité de l'appelant, se sont divisés sur la question de la validité de l'action.

Pour la majorité, formée par M. le Juge en chef Galipeault et lui-même, M. le Juge Hyde motive comme suit, en substance, le jugement affirmant la validité de l'action. S'appuyant sur l'autorité de Lafleur, Conflict of Laws, il rappelle que la preuve de la loi étrangère est, au Québec,

[1] [1961] B.R. 239.

une question de fait et qu'en l'absence d'une erreur manifeste—qu'il ne peut trouver en l'espèce—,il n'y a pas lieu de modifier l'appréciation qu'en a faite le Juge au procès; notant que ce dernier a jugé que l'irrégularité invoquée par l'appelant est matière de procédure, il s'ensuit que la nullité en résultant est purement relative et non d'ordre public. Retenant de plus que l'appelant ne s'en est pas prévalu par exception préliminaire et que tous les bénéficiaires du recours en dommages, ayant plein exercice de leurs droits, étaient partie à l'action, il considère qu'inclure l'administrateur comme demandeur n'ajouterait rien puisque, suivant l'appréciation de la preuve sur la Loi du Maine faite par le Juge au procès, l'administrateur n'est partie à l'action que pour faire valoir les droits des demandeurs. Il invoque enfin *Hammond v. Augusta Railway Company*[1], une décision de la Cour Suprême de cet État citée et produite par l'avocat Wright au cours de l'enquête, et conclut au rejet de l'appel.

Dissident, M. le Juge Taschereau estime que les opinions des experts étant partagées, la Cour n'est pas liée par la conclusion du premier Juge; qu'au regard des dispositions de la loi, du témoignage de l'expert de la défense et de la jurisprudence par lui citée, il s'agit non pas d'une simple question de procédure comme l'ont prétendu les experts de la demande, mais d'une question de fond et que les demandeurs agissant personnellement n'auraient pu validement, faute de qualité, intenter une telle action dans l'État du Maine. Se posant alors la question de savoir si les demandeurs ont qualité pour poursuivre en leur nom personnel, comme ils l'ont fait, dans la province de Québec, le savant Juge répond négativement et ce, pour deux raisons. Il s'appuie d'abord sur des décisions et traités, respectivement rendues et écrits en France, pour supporter la proposition générale que suivant le droit international privé, la qualité doit s'apprécier non pas en fonction de la loi du for mais d'après la loi qui régit le fond du litige. Il convient de signaler, je crois, qu'aucune de ces autorités, postérieures à la codification du *Code Civil* de la province de Québec et énonçant la doctrine moderne française en droit international privé, ne réfère à un cas en tous points similaire à celui qui nous occupe. Comme second motif, le savant Juge

[1] 106 Maine 109.

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note que les conditions fondant l'exercice d'un recours en dommages dans la province de Québec à la suite d'un délit commis dans une autre juridiction ont donné lieu à diverses interprétations, mais que le principe posé par le Comité Judiciaire du Conseil Privé dans *Canadian Pacific Railway Co. v. Parent*[1] paraît bien s'appliquer à l'espèce. Il en conclut que l'appel devait être maintenu et les demandeurs déboutés.

Sur le pourvoi subséquent de l'appelant à cette Cour, la question de notre juridiction relativement aux intimés Milford R. Holden et Harold C. Holden ayant été soulevée par le Juge en chef, l'appelant fit motion pour permission d'appeler; cette motion, du consentement du procureur de ces intimés, fut accordée mais sans frais.

La solution des conflits des lois varie suivant le droit international privé de chaque État; c'est là une conséquence de leur indépendance. Niboyet, Manuel du Droit International Privé, 2e éd., 463 et seq. Au Canada, où la souveraineté législative en matière de droit civil appartient exclusivement aux provinces, c'est le droit international privé de la province où le litige est soumis—en l'espèce, la province de Québec—qui régit. La règle de ce droit, en ce qui concerne l'obligation résultant de délit ou quasi-délit est, suivant une jurisprudence maintenant définitivement arrêtée, la même, *mutatis mutandis,* que celle du droit international privé en Angleterre. Voir *McLean v. Pettigrew*[2] et décisions y citées On trouve l'expression de cette règle dans Dicey's Conflict of Laws, 7e éd., à la page 940:

> An act done in a foreign country is a tort, and actionable as such in England, only if it is both
>
> (i) actionable as a tort, according to English law, or, in other words, is an act which, if done in England, would be a tort; and
>
> (ii) not justifiable, according to the law of the foreign country where it was done.

Dans *McLean v. Pettigrew, supra,* on a rappelé que l'expression «actionable» dans (i) signifie «un acte qui, s'il était fait en Angleterre, donnerait ouverture à une action suivant la loi anglaise» et que l'expression «not justifiable» dans (ii) signifie un acte qui n'est pas innocent ou excusable ou, en d'autres mots, «which is either actionable or punishable

[1] [1917] A.C. 195, 20 C.R.C. 141, 33 D.L.R. 12.
[2] [1945] R.C.S. 62, 2 D.L.R. 65.

according to the law of the country where it is done». Pour juger du droit d'action au lieu du for, on s'arrête donc à la nature et aux conséquences juridiques de l'acte et on détermine si cet acte est à la fois (i) actionnable comme délit ou quasi-délit au lieu où il est poursuivi et (ii) ou bien actionnable ou bien punissable au lieu où il a été commis. En présence des dispositions de l'art. 1056 du *Code Civil* de la province de Québec d'une part et, d'autre part, des dispositions de l'art. 9 de la loi précitée du Maine, on ne peut mettre en doute qu'en l'espèce, ces deux conditions sont présentes et que l'accident causé par l'appelant dans l'État du Maine donne, au bénéfice des intimés, dans le Québec, droit d'action en dommages contre lui.

Ces derniers pouvaient-ils, comme ils l'ont fait, se porter personnellement demandeurs pour l'exercice de ce remède établi à leur bénéfice? Poursuivant, à la page 954, ses explications sur la règle précitée de droit international privé régissant en Angleterre et adoptée dans le Québec, Dicey écrit ce qui suit:

> To be, in the traditional sense, "of such a character that it would have been actionable if committed in England" the act must be of such a kind as would, if done in England, have given rise to a cause of action in favour of the plaintiff who is claiming redress. Thus, if by the *lex loci delicti* rights resembling those created by the English Fatal Accident Acts were conferred upon relatives of a deceased person who have no such rights under English law, they could not successfully sue in England. On the other hand, if, by the *lex loci delicti,* the personal representative of the deceased, or a person occupying a position similar to that of a personal representative in the English sense, is entitled to claim such rights for the benefit of the deceased's next-of-kin, any personal representative deriving his title from English letters of administration or an English grant of probate should, it is submitted, be regarded as a proper plaintiff in England. Whether, e.g., the deceased's brother can claim damages by reason of his death, is a matter of substantive law, but who—as personal representative—may act for the dependants is a matter of procedural machinery. Hence the fact that, by the *lex loci delicti,* a person other than the English personal representative can, in a representative capacity, enforce these rights, should not stand in the way of an action brought in England by the English personal representative.
>
> The plaintiff will, however, only succeed, if the right which he claims vests in him by virtue of the *lex loci delicti* as well as the *lex fori.* Thus, a dependant claiming damages by reason of the death of a person must satisfy the court that he belongs to the category of relatives entitled to raise this claim both under a statute of the *forum* and under a statute in force at the *locus delicti.*

Ces commentaires de Dicey, étayés de renvois apparaissant au bas de la même page, doivent, aussi bien que la

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règle qu'ils précisent, être retenus comme l'expression du droit international privé du Québec sur la question de la validité de l'action qui nous occupe. Sous cet aspect, suivant ce droit et dans les circonstances de cette cause, la question soulevée doit être considérée comme matière de procédure ou, suivant les termes de Dicey, de «procedural machinery» n'affectant pas la validité de l'action poursuivie, en l'espèce, suivant la loi du Québec.

D'accord avec le Juge au procès et ceux de la majorité en Cour d'Appel, je dirais que la prépondérance de la preuve sur la Loi du Maine établit que cette disposition de l'art. 10 prescrivant que l'action doit être portée par et au nom du «personal representative» en est une de procédure. Le caractère impératif de la disposition n'en change pas cette nature; les experts de la demande affirment que le défaut de s'y conformer est couvert si on ne s'en est pas plaint avant l'audition au mérite par le jury. Tenant de l'opinion contraire, l'expert de la défense a de plus, contrairement aux experts de la demande, affirmé que le «personal representative»—en l'espèce, l'administrateur—est obligé d'intenter l'action même si ceux au bénéfice desquels elle est autorisée expriment la volonté d'y renoncer; c'est là, à mon avis, une opinion extravagante atténuant la valeur qu'il convient de donner à ce témoin comme expert. Au surplus, et de la décision dans *Hammond v. Augusta Railway Company, supra,* il y a lieu de reproduire, au soutien de l'opinion exprimée par les experts de la demande, les extraits suivants sur l'interprétation donnée à cette Loi du Maine par la Cour Suprême de cet État:

> The suit is not for the benefit of the estate and creditors have no interest in it. True, such suit is brought in the name of the Administrator but he is merely the nominal party and acts as trustee.
>
> * * *
>
> Under section 10, the party for whose benefit the action is brought depends upon the nature of the family that is left.....But in any event the immediate, absolute and final vesting of the right occurs at the time of the decease, not at the time of bringing suit or of recovery. The beneficiaries have a right of action then or not at all and the facts of each particular case determine which beneficiaries have the right.
>
> * * *
>
> Upon her death, therefore, the right of action by the statute, vested solely and exclusively for the benefit of her husband. He alone was entitled to the amount to be recovered, and could hold and dispose of the same at pleasure.

Les demandeurs en cette cause sont tous majeurs, usant de leurs droits, et sont tous et seuls bénéficiaires du droit d'action créé par la Loi du Maine. La disposition voulant que cette action soit portée par et au nom du «personal representative» n'a pour seule fin, suivant la preuve non contredite, que d'assurer qu'il n'y ait qu'une seule action et que tous les bénéficiaires y soient mentionnés. La qualité en laquelle agirait, en l'espèce, le «personal representative» n'est pas, au sens propre, la qualité dont il s'agit dans le cas des tuteurs, curateurs, exécuteurs ou autres agissant pour des incapables ou saisis eux-mêmes ès-qualité d'un droit qu'ils doivent faire valoir par action.

Enfin, et en tout respect pour le Juge dissident, j'ajouterais que rien de ce qui a été dit par le Comité Judiciaire du Conseil Privé dans *Canadian Pacific Railway Company v. Parent, supra,* ne vient en conflit avec les vues qui précèdent. Dans cette cause on jugea en somme que la compagnie appelante n'étant ni civilement—parce que préalablement et contractuellement libérée de toute responsabilité quasi-délictuelle—ni criminellement responsable de la mort du défunt survenue à la suite d'un accident dans la province d'Ontario et que l'application territoriale de l'art. 1056 du *Code Civil* étant présumée limitée à la province de Québec, l'action intentée dans la province de Québec ne pouvait être maintenue.

Étant d'avis que tant d'après le droit international privé du Québec que d'après la Loi du Maine, il s'agit en l'espèce d'une question de procédure n'affectant pas la substance du droit donné aux intimés par la *lex loci delicti* et que c'est alors la procédure du for, soit du Québec, qui régit, je dois conclure à la validité de l'action poursuivie par les intimés conformément à cette procédure.

Pour ces raisons, je renverrais l'appel avec dépens.

LE JUGE TASCHEREAU (*dissident*):—Cette cause présente de sérieuses difficultés, comme d'ailleurs la plupart des litiges entre personnes qui sont domiciliées dans des juridictions différentes. Les faits qui sont essentiels à l'intelligence de ce procès peuvent se résumer ainsi:

Le 20 octobre 1952, Henry L. Holden, domicilié à Jackson dans l'État du Maine, se dirigeait de l'est à l'ouest, lorsqu'il fut frappé par une automobile conduite par le défendeur-

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appelant, domicilié à Lévis, P.Q., et qui procédait vers le nord. Holden subit de très graves blessures qui, le lendemain, devaient entraîner sa mort.

Les demandeurs, l'épouse de la victime Dame Issie Holden et ses deux fils, Milford et Harold, ont réclamé devant la Cour supérieure de Québec la somme de $4,728.15, à être répartie entre les trois demandeurs dans la proportion déterminée par la Cour.

L'honorable Juge Marquis siégeant à Québec, a conclu à la responsabilité de l'appelant-défendeur, et l'a condamné à payer aux demandeurs la somme de $2,728.35, dont $2,000 payables à l'intimée, épouse de la victime, et $728.35 aux deux autres demandeurs. La Cour d'Appel[1] a confirmé ce jugement, l'honorable Juge André Taschereau étant dissident.

La question de responsabilité ne se présente pas devant cette Cour. Dans son factum en effet, l'appelant admet qu'il y a sur ce point des vues identiques exprimées par la Cour supérieure et la Cour d'Appel, et ne voit pas comment il pourrait réussir à obtenir un jugement différent sur les faits. D'ailleurs, lors de l'audition, il a formellement abandonné ce moyen.

Mais l'appelant soumet que les demandeurs ne peuvent réussir à cause de leur état et de leur capacité, et son argument peut se résumer ainsi:—Les trois demandeurs sont domiciliés dans l'État du Maine où s'est produit l'accident. Ils ont institué la présente action, et d'après l'appelant, ils ne pouvaient le faire, car en vertu de la loi de l'État du Maine, c'est l'administrateur nommé comme il l'a été dans le présent cas, qui doit toujours se porter demandeur dans les cas comme celui qui nous occupe.

L'un des témoins experts des demandeurs, M. Carl Wright, commentant les lois du Maine au sujet du droit de poursuivre, s'exprime de la façon suivante:

> In the State of Maine before any person has a right for a cause of action, an administrator of the estate must be appointed, *and the law only gives that right if an administrator is appointed.* If there had been a will the claim of the representative of the estate would have been executor, but there was no will in this particular case, therefore an administrator was appointed and the administrator is given a right to bring an action against the party allegedly causing the accident, for death and also for conscious pain and suffering preceding and up to death.

[1] [1961] B.R. 239.

M. Wallace A. Bilodeau, un autre avocat expert entendu par les demandeurs, a témoigné dans le même sens:

> De par nos lois, il faut que l'action soit commencée par un représentant personnel de la succession, *soit un exécuteur, ou un administrateur de la succession.*

M. John L. Merrill, avocat entendu comme expert par la défense, s'accorde entièrement avec les vues exprimées par les témoins des demandeurs. Voici ce qu'il dit:

> He (the administrator) under the terms of our statute, *is the only person who may come in and have, standing as a party,* a mandate under the Wrongful Act Statute, because the so-called administrator or representative well appointed in the State of Maine could, *and no one else, obtain a right under the statute.*

Il me semble clair que si la présente action avait été instituée dans l'État du Maine, comme elle aurait pu l'être, l'action n'aurait pu réussir. Le statut qui accorde un recours en dommages dans l'État du Maine, dans les circonstances qui se présentent actuellement, est une dérogation au droit commun qui dénie l'action. Il faut que ses prescriptions soient rigoureusement observées. Les dispositions importantes de cette loi (ch. 124 Public Laws 1891) sont les arts. 9 et 10 qui se lisent de la façon suivante:

> (9) Whenever the death of a person shall be caused by wrongful act, neglect, or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the party who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony.
>
> (10) Every such action shall be brought by and in the names of the personal representatives of such deceased person and the amount recovered in every such action, except as hereinafter provided, shall be for the exclusive benefit of the widow or widower, if no children, and of the children, if no widow or widower, and if both then for the exclusive benefit of the widow or widower and the children equally, and if neither of his or her heirs the jury may give such damages as they shall deem fair and just compensation not exceeding $10,000 with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought and in addition thereto shall give damages as will compensate the estate of such deceased person for reasonable expenses of medical surgical and hospital care and treatment, and for reasonable funeral expenses, provided that such action shall be ceommenced within two years after the death of such person.

Ces deux articles permettent donc d'exercer trois recours. En premier lieu, ils autorisent le maintien d'une action pour

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réclamer des dommages qu'aurait eu le droit de réclamer la victime si la mort n'avait pas résulté; en second lieu, le droit d'exiger la perte pécuniaire occasionnée au demandeur; et en troisième lieu, les frais médicaux, les frais d'hospitalisation et les frais funéraires. Mais dans tous les cas, les seuls bénéficiaires seront l'époux survivant et les enfants s'il y en a. Mais, nous dit l'art. 10, seul l'administrateur d'une succession *ab intestat,* comme c'est le cas qui nous occupe, peut instituer cette action; et dans le cas de la succession testamentaire, ce sera l'exécuteur qui devra se porter demandeur. Évidemment, le législateur a voulu investir l'exécuteur testamentaire, ou l'administrateur suivant le cas, du droit exclusif de poursuivre, afin d'éviter la multiplicité des actions, et qu'une seule ne soit instituée, à condition qu'elle le soit dans les deux ans du décès de la victime.

Comme on peut le voir, ce statut confond dans un même article (10) le droit qu'ont les héritiers chez-nous de poursuivre comme héritiers (C.C. 607) pour exercer les actions du défunt, et le droit que peuvent avoir le conjoint survivant et les descendants de réclamer pour dommages personnels en vertu des dispositions de l'art. 1056 C.C. Les premiers sont des droits patrimoniaux dont sont investis les héritiers, parce qu'ils sont transmissibles, et les seconds sont des droits extra-patrimoniaux qui n'ont une valeur pécuniaire que pour leurs titulaires (1056 C.C.) et, par conséquent, ne sont pas susceptibles de transmission. (Vide *Driver et al. v. Coca-Cola*[1].)

Ceux qui peuvent réclamer ici ne sont pas nécessairement, comme dans le Maine, les mêmes personnes. En effet, les héritiers testamentaires pourront poursuivre sous l'art. 607 du *Code Civil,* et exercer les droits qu'aurait eus le testateur s'il eût vécu, mais le droit de réclamer sous 1056 sera toujours du droit propre aux ascendants, au conjoint et aux descendants, mais c'est le contraire qui existe dans l'État du Maine où il ne peut y avoir qu'une seule et même action, instituée au nom de l'administrateur qui, comme je l'ai dit déjà, puise ses droits de la loi de son domicile.

C'est ainsi que l'a voulu le législateur. En vertu de l'art. 6 du *Code Civil* de la province de Québec, l'habitant du Bas-Canada, tant qu'il y conserve son domicile, est régi, même

[1] [1961] R.C.S. 201, 27 D.L.R. (2d) 20.

lorsqu'il en est absent, par les lois qui règlent l'état et la capacité des personnes; *mais elles ne s'appliquent pas* à celui qui n'y est pas domicilié, lesquel reste soumis à la loi de son pays *quant à son état et à sa capacité.*

Ce principe est universellement reconnu. Ainsi, commentant l'art. 6 du *Code Civil,* Mignault dit, vol. 1, page 79:

> On le voit, il ne s'agit nullement de la nationalité, c'est le *domicile* qui suit l'individu partout où il porte ses pas *et qui règle sa capacité civile.*

A la page 84, il amplifie:

> Je trouve dans la disposition suivante de l'article 14 (maintenant 79 et 80 C.P.) un développement de ce principe.

Et il ajoute:

> C'est encore que la capacité ou l'incapacité de la personne la suit partout. Si elle est capable d'ester en justice dans son pays, elle le sera également ici.

Trudel, Traité de droit civil du Québec, vol. 1, page 41:

> A la règle générale que nos lois personnelles s'appliquent à quiconque se trouve dans la province, existe une exception aussi importante que la règle elle-même. En effet, *l'état et la capacité* des personnes sont déterminés par la loi de leur *domicile* et non pas par nos lois locales.

A la page 46:

> Un curateur nommé en vertu d'une loi étrangère conserve devant nos tribunaux tous les pouvoirs qui lui sont conférés par cette loi.

En Cour de Revision, dans une cause de *Breault et al. v. Wadleigh*[1], MM. les juges Routhier, Andrews et Larue ont décidé, et ils citent une nombreuse jurisprudence, ce qui suit:

> An administrator duly appointed in the State of New Hampshire, to the estate of a person dying there, intestate, but owning property in Canada, is the legal representative of the deceased in this province as well as in New Hampshire; he alone is entitled to administer the estate, *and the heirs-at-law here have no right,* adversely to him, to obtain payment of any sums due deceased in this province.

Les demandeurs personnellement ne pouvaient donc pas poursuivre chez eux, et comme le dit M. Bilodeau, un expert entendu au procès pour prouver la loi étrangère:

> Q. Monsieur Bilodeau, dans le Maine, si cette action est prise, comme la désignation est actuellement, je comprends qu'il y aurait eu des procédures, soit un plaidoyer disant que c'est pas correct; est-ce que la

[1] (1894) 6 C.S. 79.

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partie pourrait payer les frais, recommencer et continuer? . . . ou si l'action aurait été rejetée?

R. L'action aurait été rejetée mais il aurait pu recommencer.

Q. Si c'était prescrit, est-ce qu'il aurait perdu ses droits?

R. C'est mon opinion qu'il aurait perdu ses droits.

Comme les demandeurs, dans la présente cause, importent avec eux leur état d'héritiers et la capacité qui en résulte *suivant les lois de leur domicile,* ils ne peuvent donc pas instituer une action ici, comme celle qui l'a été, et se substituer à l'administrateur qui seul est investi de ce droit.

Les effets de l'art. 79 du *Code de procédure civile* doivent nécessairement se combiner avec ceux de l'art. 6 du *Code Civil.* L'article 79 est en effet rédigé dans les termes suivants:

> Art. 79. Une corporation ou personne, dûment autorisée à l'étranger à ester en justice, peut exercer cette faculté devant tout tribunal de la province.

Cet article donne à l'étranger accès à nos tribunaux, et permet à ceux-ci d'accueillir l'action de celui qui, dans un pays étranger, a la qualité voulue pour se porter demandeur chez lui.

Il y a évidemment de nombreuses sortes de «qualités». Ainsi, le tuteur agit en qualité de représentant de son pupille, le syndic en matière de faillite représente le failli ou la masse, et l'administrateur agit en sa qualité de représentant de ceux pour qui il occupe. C'est à eux que donne le droit de plaider dans la province de Québec l'art. 79 du *Code de procédure,* quand les demandeurs ont la qualité voulue dans leur pays. Le mot «état» se compose des droits inhérents à une personne, et que la loi civile prend en considération pour y attacher des effets. La «qualité» au contraire est le titre sous lequel une partie ou un plaideur figure dans un acte juridique ou dans une instance. Chez nous, le mot «état» peut se confondre avec le mot «qualité». Ainsi, la veuve a l'état de veuve et la femme mariée a un état différent, et leur capacité juridique sera conséquemment différente. Le tuteur qui poursuit ès-qualité aura une situation particulière, mais c'est toujours de l'«état» ou de la «qualité» que découlent la capacité et le droit de plaider.

On a prétendu à l'argument qu'il s'agissait ici d'une question de procédure et qu'en conséquence, si l'action avait été

instituée dans l'état du Maine, la Cour aurait pu autoriser un amendement et substituer à ceux qui ont poursuivi illégalement le nom de l'administrateur. Je ne puis partager ces vues en ce qui concerne la procédure dans la province de Québec. La procédure est en effet l'ensemble des actes accomplis pour parvenir à une solution juridictionnelle. C'est, en d'autres termes, la branche de la science du droit qui a pour objet de déterminer l'instruction des procès.

Le droit de plaider est un droit civil fondamental, sur lequel repose la validité d'une action, et il est impossible de dire que ce droit fasse partie de l'ensemble des règles auxquelles sont assujetties les actions en justice pour en arriver à une détermination. Comme le droit au procès par jury, le droit de plaider est un droit supérieur et indépendant de la procédure. *Dudemaine v. Coutu*[1]; *Picard v. Warren*[2].

Même s'il fallait erronément conclure que ce droit fait partie de la procédure civile, ce serait sûrement la loi de Québec qui s'appliquerait, car en vertu des dispositions de l'art. 6, para. 1 du *Code Civil,* c'est la loi de Québec qu'il faut appliquer lorsqu'il s'agit de procédure civile. Le paragraphe 1 de l'art. 6 C.C. se lit ainsi:

> Les biens meubles sont régis par la loi du domicile du propriétaire. C'est cependant la loi du Bas-Canada qu'on leur applique dans le cas où il s'agit de la distinction et de la nature des biens, des privilèges et des droits de gage de contestations sur la possession, de la juridiction des tribunaux, *de la procédure,* des voies d'exécution et de saisie, de ce qui intéresse l'ordre public et les droits du souverain, ainsi que dans tous les autres cas spécialement prévus par ce code.

Si l'étranger doit importer avec lui son état et sa capacité, il n'importe pas la procédure de son pays, et c'est la procédure de la province qui règle la façon de conduire un procès et qui peut autoriser ou refuser les amendements. Peut-être que si l'action avait été instituée au nom des héritiers dans l'état du Maine, un amendement eut possiblement été permis suivant la procédure de la loi du forum, mais je ne connais aucune disposition légale dans la province de Québec qui permette, une fois le procès commencé, de changer le demandeur. D'ailleurs, et ceci me semble-t-il dispose du litige, l'action a été prise dans la province de Québec, et aucun amendement n'a été proposé. Les demandeurs n'ont

[1] [1943] R.C.S. 464. [2] [1952] 2 R.C.S. 433.

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donc pas la qualité voulue pour plaider devant nos tribunaux.

En vertu des dispositions du *Code de procédure civile*, les parties peuvent avant jugement, avec la permission du juge, amender le bref d'assignation, la demande et la défense, ou toute autre pièce de la plaidoirie. On peut ainsi par amendement corriger une simple erreur dans le bref d'assignation: *Home Insurance Company of New York v. La Société Coopérative*[1]. Mais la Cour supérieure de Québec dans *Dufour v. Guay*[2] a décidé qu'un amendement à l'effet de réclamer à titre d'héritier une créance réclamée originairement à titre de créance personnelle, ne peut être accueilli. Dans *Ellis v. Griab*[3], M. le Juge Bruneau a décidé qu'il ne pouvait pas être permis, sous prétexte d'amendement, de substituer un défendeur à un autre, sans recourir à la voie ordinaire de l'assignation.

Les intimés ont invoqué, pour appuyer leur droit de poursuivre, l'art. 174 du *Code de procédure civile* qui est à l'effet que le défendeur *peut* invoquer par exception à la forme, lorsqu'ils lui causent un préjudice, les moyens qui résultent de l'incapacité du demandeur ou du défendeur et de l'absence de qualité du demandeur ou du défendeur.

Je suis clairement d'opinion que le défendeur n'était pas obligé d'invoquer cette absence de qualité par exception préliminaire. L'article 174 *permet* de soulever ce moyen par exception préliminaire, mais l'article n'est pas impératif, et il y a des cas où les moyens peuvent être soulevés à tout stade de la cause. Il serait en effet extraordinaire qu'un mineur qui n'a pas le droit de poursuivre, puisse tout de même, sans être représenté par son tuteur, obtenir gain de cause parce que le défendeur aurait négligé d'invoquer le moyen de son incapacité par exception à la forme. Ainsi en est-il de la femme mariée en communauté de biens qui prendrait une action pour réclamer une créance due à la communauté, quand seul le mari, chef de la communauté, est investi du droit de poursuivre. Je ne puis admettre que le Code de procédure, qui ne détermine pas les droits, mais qui ne donne que les moyens de les exercer, soit supérieur aux dispositions du *Code Civil* de la province. C'est résoudre la question que de la proposer.

[1] (1929) 36 R.P. 102.
[2] (1919) 53 C.S. 97.
[3] (1917) 19 R.P. 332.

D'ailleurs, c'est bien ce que nos tribunaux ont déclaré. La Cour Suprême du Canada, dans un arrêt rendu en 1900 de *McFarran v. Montreal Park and Island Ry. Co.*[1], a décidé que l'art. 174 n'a pas cette rigidité, et M. le juge Taschereau s'exprime de la façon suivante:

> We are of opinion that the plaintiff's appeal from that judgment should be dismissed upon the ground that she had, as «commune en biens», no right of action, and that the defendant *was not obliged to plead it by exception to the form.*

Dans la même cause, la Cour de Révision[2] avait antérieurement décidé ce qui suit:

> JUGE:—1. Que la femme qui n'allègue et ne prouve pas qu'elle est séparée de biens, ne peut intenter, même avec l'autorisation de son mari, une action en dommages-intérêts pour accident, cette action appartenant au mari seul.
>
> 2. Qu'une telle action, prise par la femme, manquant complètement de base, le verdict du jury, en faveur de la demanderesse peut être annulé en révision, *même si la question d'incapacité n'a pas été soulevée devant le tribunal de première instance.*

Dans *Pouliot v. Thivierge*[3], M. le juge Létourneau, parlant pour la majorité de la Cour, déclare clairement que si l'exception à la forme est permise en vertu du Code, elle n'empêche pas le défendeur de soulever ce moyen à tout stade de la procédure. Voici ce qu'il dit:

> Il me paraît certain que ce défaut d'autorisation doive entraîner une nullité absolue de la procédure.
>
> Et si l'on objecte que l'exception à la forme n'était pas le moyen qu'aurait dû prendre l'appelant, je rappelle seulement que cette nullité absolue et qui pouvait être invoquée *en tout temps,* se rapporte en somme à une *incapacité de la demanderesse,* et que notre Code de procédure nouveau (art. 174, par. 2) *permet* que cette question d'une incapacité du demandeur soit désormais soulevée par exception à la forme, et nous ne pourrions que louer le défendeur appelant de s'être ainsi pourvu par exception préliminaire, s'il redoutait qu'on soulevât la question d'une autorisation tacite résultant de sa contestation au mérite, et qui longtemps a été controversée.

Dans une cause de *Vizien v. Rozon et al.*[4], M. le juge Surveyer a décidé que le tribunal pouvait, au cours de l'instance, après les délais dans lesquels on peut faire une objection préliminaire, *proprio motu* soulever l'objection résultant du fait que la demande est portée par la femme

[1] (1900) 30 R.C.S. 410.
[2] (1899) 2 R.P. 14.
[3] (1928) 45 B.R. 1 à 7.
[4] (1935) 39 R.P. 200.

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autorisée par son mari, au lieu qu'elle ne soit instituée par le mari lui-même, chef de la communauté.

Quand le droit d'action n'existe pas, à cause de l'absence de qualité ou de capacité du demandeur, le défendeur *pourra* sans doute soulever ce moyen par exception préliminaire, mais son défaut de le faire n'investit pas le demandeur d'un droit que lui dénie le *Code Civil.*

Pour résumer ma pensée, je suis d'opinion que la loi du Maine détermine seulement l'état, la capacité ou la qualité des demandeurs; que les demandeurs n'avaient ni la qualité ni la capacité de poursuivre; que seul l'administrateur avait la capacité qui découle de sa qualité; que l'action dans l'état du Maine leur serait interdite et par conséquent, ici, à cause des dispositions impératives de l'art. 6 C.C.; qu'il ne s'agit pas dans la présente cause d'une question de procédure, mais bien d'un droit fondamental qui s'appelle le droit de plaider; qu'à tout événement si, ce que je ne puis admettre, il s'agissait d'une question de procédure, c'est la procédure de Québec où a lieu le procès qui devrait s'appliquer, et qu'en vertu de notre loi, aucun amendement ne peut être admis ici pour substituer un demandeur à un autre. Je crois enfin, suivant une décision de cette Cour, *supra,* qu'il n'était pas nécessaire de soulever par exception à la forme cette absence de qualité des demandeurs à qui la loi du Maine interdit de plaider, et que ce moyen pouvait être invoqué à tout autre stade de la procédure.

Je suis d'avis que l'appel doit être maintenu, l'action rejetée avec dépens de toutes les cours.

Appel rejeté avec dépens, le Juge TASCHEREAU *dissident.*

Procureur du défendeur, appelant: Ross Drouin, Québec.

Procureur des demandeurs, intimés: Pierre Letarte, Québec.

CAMBRAI CONSTRUCTION INC. (*Demanderesse*) ..... APPELANTE;

ET

LA CORPORATION DE L'HÔPITAL DE ST-AMBROISE DE LORETTE-VILLE (*Défenderesse*) ..... INTIMÉE.

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*Oct. 30
1963
**Fév. 26

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Contrat—Construction d'un hôpital—Droit de canceller pour raisons estimées raisonnables—Octrois du gouvernement refusés—Cancellation—Action en dommages—Code Civil, arts. 1061, 1691.

En juillet 1957, la demanderesse s'est engagée par contrat à construire un hôpital pour la défenderesse. Cette dernière devait fournir les matériaux et s'engageait à payer une rémunération de $50,000. La clause 8 du contrat stipulait que la défenderesse pourrait mettre fin au contrat «pour des raisons qu'elle estimera raisonnables», et dans ce cas la demanderesse ne pourra réclamer aucun dommage. Une autre clause du contrat était à l'effet que le contrat «sera considéré comme nul» si certains octrois n'étaient pas donnés par les autorités provinciales. En novembre 1957, le contrat fut cancellé et le même jour l'exécution des travaux, assez avancés déjà, fut confiée à un autre entrepreneur.

La demanderesse a alors réclamé des dommages généraux et spéciaux de $69,654.54. La Cour supérieure a maintenu l'action pour la somme de $49,654.54 et ce montant fut réduit par la Cour du banc de la reine à $5,000. Aucune des deux Cours n'a accepté la clause 8 comme étant une fin de non recevoir. La demanderesse en a appelé à cette Cour et la défenderesse a produit un contre-appel.

Arrêt: L'appel doit être rejeté et le contre-appel maintenu.

Il n'était pas nécessaire de décider, comme l'on fait les deux autres Cours, si la clause 8 du contrat était absolue ou non, parce que la défenderesse avait des motifs raisonnables de changer d'entrepreneur. La preuve révèle que la défenderesse fut forcée de canceller le contrat vu le refus des autorités de donner les octrois nécessaires à moins que le contrat ne soit alloué à un autre entrepreneur. Il s'ensuit nécessairement qu'aucun dommage, soit général ou spécial, ne peut être accordé.

APPEL et Contre-Appel d'un jugement de la Cour du banc de la reine, Province de Québec[1], modifiant un jugement de Lizotte J. Appel rejeté et contre-appel maintenu.

Georges Pelletier, C.R., et *Yves Pratte*, C.R., pour la demanderesse, appelante.

*CORAM: Le Juge en chef Kerwin et les Juges Taschereau, Cartwright, Fauteux et Abbott.

**Le Juge en chef Kerwin est décédé avant le prononcé du jugement.

[1] [1962] B.R. 134.

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Jean Turgeon, C.R., pour la défenderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE TASCHEREAU:—Le 24 juillet 1957, la Cambrai Construction Inc. et la Corporation de l'Hôpital de St-Ambroise de Loretteville ont signé un contrat en vertu duquel cette dernière a confié à l'appelante la construction d'un hôpital à Loretteville, dont le coût approximatif devait être de $750,000.

Par ce contrat reçu devant le notaire André Cossette, la Compagnie de Construction s'engageait à faire les travaux, à procurer la main-d'œuvre, et l'hôpital devait fournir les matériaux et s'engageait à payer une rémunération au montant de $50,000 à la Compagnie de Construction. Cette dernière, tel qu'il est stipulé au contrat, agissait comme «agent» de la Corporation de l'Hôpital de St-Ambroise.

Le 26 novembre 1957, l'hôpital intimé a résilié ce contrat, et le même jour a confié l'exécution des travaux, assez avancés déjà, à une autre compagnie appelée la «Komo Construction Limited» qui a complété l'ouvrage qui restait à faire. L'appelante a alors poursuivi l'intimée et a réclamé en dommages la somme de $69,654.54.

M. le Juge Lizotte de la Cour supérieure a maintenu cette action jusqu'à concurrence de $49,654.54, mais la Cour d'Appel[1] a substantiellement modifié ce jugement et a condamné l'hôpital à payer seulement la somme de $5,000. M. le Juge Rivard, dissident en partie, aurait réduit le montant accordé par la Cour supérieure à $31,655.34.

En Cour d'Appel, M. le Juge Casey parlant pour la majorité des membres du tribunal, a rejeté l'item des dommages spéciaux et, pour justifier ce rejet, il s'est exprimé de la façon suivante:

> While I have no doubt that the special damage suffered by Respondent would be the profit that it would have made had it been allowed to complete the contract, it does not follow that the stipulated fee of $50,000 was all profit. To earn this Respondent had to spend some money and in addition had to bear the cost of «toute la machinerie et l'outillage nécessaire à l'exécution du contrat à l'exclusion des . . .». Despite the statement (p. 224) that—«La demanderesse avait droit à un profit net de $50,000»—some evidence was needed to establish the portion of the $50,000 that should be regarded as profit and recoverable as damage. On this there is no proof with the result that since this type of damage cannot be presumed and cannot be fixed arbitrarily the Superior Court should have disallowed the item.

[1] [1962] B.R. 134.

En ce qui concerne les dommages généraux réclamés au montant de $25,000, M. le Juge Casey s'accorde avec M. le Juge Lizotte, et croit que la somme de $5,000 est un montant qui, quoique généreux, est légalement réclamé et ne voit pas comment la Cour d'Appel aurait pu intervenir.

L'une des clauses importantes de ce contrat est la clause 8 qui se lit de la façon suivante:

> 8. Il est spécialement convenu entre les parties que la Corporation, en aucun temps et de sa seule autorité, pourra suspendre, résilier et ou annuler le présent contrat pour des raisons qu'elle estimera raisonnables et sa décision sera finale et sans appel;
>
> Il sera alors payé à l'agent tout ce qui lui est dû à date, suivant les termes du contrat, mais l'agent ne pourra réclamer aucun dommage, compensation ou indemnité, sous quelque forme que ce soit.

La Cour supérieure pas plus que la Cour d'Appel n'a accepté cette clause comme étant une fin de non recevoir. Les deux tribunaux en sont arrivés à la conclusion que l'hôpital, malgré les mots que l'on trouve à l'article 8 «pour des raisons qu'elle estimera raisonnables», n'était pas investi du pouvoir de mettre un terme au contrat, et que son droit n'était pas absolu.

Il est bon de remarquer qu'il ne s'agit pas ici d'un contrat à forfait. S'il s'agissait d'un semblable contrat, la clause 8 n'aurait pas été nécessaire car, par l'opération de la loi, l'art. 1691 du *Code Civil* aurait trouvé son application:

> 1691. Le maître peut résilier, par sa seule volonté, le marché à forfait pour la construction d'un édifice ou autre ouvrage, quoique l'ouvrage soit déjà commencé, en dédommageant l'entrepreneur de ses dépenses actuelles et de ses travaux et lui payant des dommages-intérêts suivant les circonstances.

Mais cet article ne s'applique que lorsqu'il s'agit d'un *marché à forfait,* et non pas lorsque les parties ont fait un contrat dans le genre de celui qui nous occupe actuellement où l'entrepreneur était «agent» pour l'hôpital. C'est précisément à cause du défaut d'application de l'art. 1691 que les parties ont convenu d'intercaler au contrat la clause 8 qui, pour moi, ne présente aucune ambiguïté vu les faits révélés par la preuve.

Il est certain que cet hôpital ne pouvait être construit à moins que les octrois ne soient donnés par les autorités

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provinciales. Le contrat fait mention de ces octrois, et l'une des clauses se lit ainsi:

> Il est entendu entre les parties que le présent contrat sera considéré comme nul si la Corporation n'obtient pas du Gouvernement Provincial l'octroi de Cent cinquante mille dollars échu en juin dernier (1957) et l'octroi de Cent mille dollars payable au cours de 1958.

Or, il est clair que tous ces octrois n'étaient pas payés quand le contrat a été résilié par l'Hôpital St-Ambroise de Loretteville. M. le Docteur Larochelle, président de l'hôpital, témoigne ainsi:

> Q. Quand la corporation a résilié la contrat, le 26 novembre 1957, est-ce qu'à ce moment-là la corporation avait recu l'octroi provincial mentionné dans cette clause-là?
>
> R. Non.
>
> Q. Vous ne l'aviez pas eu?
>
> PAR LA COUR:
>
> Q. Aucun octroi?
>
> PAR Me JULES ROYER:
>
> Q. Les octrois mentionnés ici dans le contrat?
>
> R. Probablement que nous avions reçu le premier.
>
> Q. Il y avait eu des octrois de payés avant?
>
> R. Oui.

Plus loin dans son témoignage le Dr Larochelle explique que le premier octroi a été versé mais que le deuxième ne l'a jamais été, qu'il y avait bien une promesse de $150,000 sans arrêté ministériel. Il affirme que l'hôpital était dans l'impossibilité de continuer les travaux, car il n'avait pas les fonds voulus et l'octroi de $100,000 n'arrivait pas. L'hôpital a emprunté de l'argent des banques et s'est engagé, comme le dit le Dr Larochelle, jusqu'aux limites légales et financières possibles, et a été forcé de suspendre les travaux.

L'hôpital ne voulait pas entreprendre la construction sans être assuré des octrois nécessaires et, évidemment, avec la «Cambrai Construction», les octrois promis n'étaient pas payés, et l'hôpital n'avait plus de fonds nécessaires pour poursuivre son entreprise.

La seule alternative était de changer d'entrepreneur, et le jour même où le contrat a été résilié avec la «Cambrai Construction», un nouveau contrat a été signé avec la «Komo Construction», et des octrois de $1,250,000 ont été versés à l'hôpital. Il est certain qu'il fallait un changement d'entrepreneur si les octrois devaient être payés.

Il me semble évident que l'hôpital ne pouvait continuer dans de semblables conditions, et que le succès de son entreprise, vu l'absence d'octrois, était sérieusement compromis.

M. le Dr Larochelle résume ainsi son témoignage:

Q. C'est que vous voulez dire si vous ne pouviez pas les recevoir finalement ces octrois-là, vous n'étiez plus capable de marcher?

R. Exactement.

Et plus loin, le Dr Larochelle s'exprime ainsi:

Q. Est-ce que vous voulez dire par là, vous, qu'il n'y a aucun hôpital à moins d'avoir déjà de la finance qui ne peut procéder sans des octrois?

R. A moins d'avoir un philanthrope en arrière . . .

Q. Et le jour même que vous résiliiez le contrat, vous le donniez à une autre compagnie?

R. Oui.

Q. Parce que vous étiez assurés de recevoir vos subsides, n'est-ce pas, sans ça vous ne l'auriez pas donné si vous n'aviez pas été assurés de recevoir vos subsides?

R. C'est exact.

Q. Et, en fait, vous avez reçu $1,250,000?

Le changement d'entrepreneur est la seule raison qui a justifié cette façon d'agir, car l'appelante, nous révèle la preuve, a très bien exécuté les travaux qui lui ont été confiés. Il n'y a jamais eu de conflit entre les parties.

L'intimée me paraît avoir agi avec clairvoyance, car l'hôpital qui devait coûter $750,000 a reçu en octrois $1,250,000. Ce qui évidemment inquiétait l'intimée, c'est que le second octroi de $150,000 n'a jamais été autorisé légalement, et il n'y avait même pas de promesse pour l'avenir. Le nouveau contrat a créé une nouvelle atmosphère dont l'intimée a grandement bénéficié.

La Cour d'Appel, comme je l'ai signalé antérieurement, a jugé que la clause 8 du contrat n'était pas absolue. Quoique l'hôpital eût le droit «en aucun temps et de sa seule volonté» de «suspendre, résilier ou annuler le contrat», il fallait tenir compte des mots «pour des raisons qu'elle estimera raisonnables» et «cette décision sera finale et sans appel», et on a décidé qu'il fallait des raisons et que l'hôpital ne pouvait pas unilatéralement mettre un terme à son contrat.

Je ne crois pas qu'il soit nécessaire de décider cette question, car je suis convaincu que l'hôpital avait des motifs raisonnables de changer d'entrepreneur, afin de lui permet-

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tre de mener son entreprise à bonnes fins, et de la conduire à son complet développement. Il s'ensuit nécessairement qu'aucun dommage ne peut être réclamé. Comme l'article 8 du contrat doit trouver toute sa rigide application, parce qu'il constitue la loi des parties, je ne vois pas comment l'appelante peut réussir. L'agent a été payé de tout ce qui lui était dû à la date de la résiliation, y compris la proportion des honoraires auxquels il avait droit, et il est convenu que dans le cas d'un telle éventualité, il ne pourrait réclamer aucun dommage ou compensation. Si la clause 8 est absolue, tout recours est évidemment interdit. Mais si la clause, comme je le crois, justifie la résiliation pour des motifs que l'intimée a cru raisonnables, alors je suis d'opinion qu'il a été établi à ma satisfaction que des causes suffisantes existaient pour autoriser la répudiation de la convention intervenue.

A ces raisons qui à mon sens justifient le rejet de l'appel principal, je dois ajouter qu'il n'est pas nécessaire de décider si les dommages spéciaux doivent ou non être accordés. En ce qui concerne les dommages généraux, estimés à $5,000 par le juge au procès et par la majorité de la Cour d'Appel, je crois qu'ils ne peuvent être accordés pour les motifs qui justifient le rejet de la réclamation pour dommages spéciaux.

Par l'application des termes du contrat (clause 8), qui est la souveraine expression de la volonté commune des parties, aucun dommage quel qu'il soit ne peut être réclamé, que ce soit comme résultat de l'absolutisme de ces termes ou de la présence de motifs raisonnables qui ont justifié sa résiliation. Le contrat n'établit aucune différence entre les dommages généraux et les dommages spéciaux.

L'appel doit être rejeté, de même que l'action intentée, avec dépens de toutes les Cours. Le contre-appel doit être maintenu avec dépens devant cette Cour.

Appel rejeté et contre-appel maintenu.

Procureur de la demanderesse, appelante: Georges Pelletier, Québec.

Procureur de la défenderesse, intimée: Jean Turgeon, Québec.

G. A. FALLIS AND D. M. DEACON .....APPELLANTS; 1962 *Dec. 6, 7, 11

AND

UNITED FUEL INVESTMENTS, LIMITED ..... RESPONDENT. 1963 **June 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Petition for winding-up order—Resolution of common shareholders—Whether preference shareholders entitled to notice of meeting and a vote—Whether a discretion in the Court to refuse order—Winding-up Act, R.S.C. 1952, c. 296, s. 10(b)—Companies Act, R.S.C. 1952, c. 53, s. 101.

Pursuant to a resolution of the common shareholders of the respondent company that the company be wound up under the provisions of the *Winding-up Act*, R.S.C. 1952, c. 296, a petition was made for a winding-up order. A notice of the meeting at which the resolution was passed had been sent to the common shareholders but not to the holders of class "A" and class "B" preference shares. The petition was rejected by the trial judge solely on the ground that although only the common shareholders were given voting rights by the letters patent, this did not govern a special meeting of shareholders under s. 10(*b*) of the *Winding-up Act* and that all shareholders, preferred as well as common, were entitled to notice and to vote at the meeting.

The Court of Appeal allowed an appeal from this decision and in an unanimous judgment held that the preference shareholders were not entitled to a notice of the meeting and a vote, that the special meeting of shareholders referred to in s. 10(*b*) was simply a special general meeting of the shareholders within the meaning of s. 101 of the *Companies Act*, R.S.C. 1952, c. 53, and, hence, the holders of non-voting preference shares were not entitled to notice or to vote. It was also held that where a majority of the common shareholders have passed a resolution under s. 10(*b*), any discretion the Court may have to refuse a winding-up order should not be exercised unless it can be shown that the action of the majority shareholders was fraudulent or equivalent to bad faith. Subject to this, the right to decide that a company should be wound up rests with the majority shareholders. By leave of this Court, an appeal was brought from the winding-up order made by the Court of Appeal.

Held: The appeal should be dismissed.

The Court agreed with the judgment of the Court of Appeal that the preference shareholders were not entitled to notice of the meeting and a vote. The submission that there exists in the Court an equitable jurisdiction which in the circumstances of this case should be exercised against the winding-up order failed. The Court has some discretionary power to refuse an order under all subsections of s. 10 with the exception of subs. (*a*), but where was such a discretion to be found on the application of a preferred shareholder who did not want to be redeemed? Redemption is a normal incident of preference shares. It

*PRESENT: Kerwin C.J. and Taschereau, Martland, Judson and Ritchie JJ.

**Kerwin C.J. died before delivery of judgment.

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was true that the "B" shares in contrast to the "A" shares were not redeemable in the ordinary sense. It was also true that they resulted from a reorganization. But the "B" shareholders were really trying to tell the company that in its prosperity it must carry on indefinitely because of their right to participate in the common dividends. A dismissal of the petition would inevitably be an affirmation of this position and would put upon the letters patent a construction that they could not bear, namely, that there could be no winding-up without the consent of the "B" shares.

Symington v. Symington (1905), 13 Sc.L.T. 509; *Loch v. John Blackwood Ltd.*, [1924] A.C. 783, distinguished; *Castello v. London General Omnibus Co.* (1912), 107 L.T. 575, distinguished and disapproved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of McLennan J. dismissing a petition for a winding-up order. Appeal dismissed.

B. J. MacKinnon, Q.C., and *B. A. Kelsey*, for the appellants.

A. S. Pattillo, Q.C., and *D. J. Wright*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal by two shareholders of the respondent company from a winding-up order made by the Court of Appeal[1] under s. 10(*b*) of the *Winding-up Act*, R.S.C. 1952, c. 296, pursuant to a resolution of the common shareholders of the company requiring the company to be wound up. The appellants are the holders of class "B" preference shares of the company. They were granted leave to appeal by this Court on March 16, 1962.

United Fuel Investments Limited was incorporated in 1928 under the provisions of the *Companies Act*, R.S.C. 1927, c. 27, for the purpose of acquiring and operating natural and other gas systems and participating in the management and operation of companies with similar undertakings. Immediately after its incorporation it acquired two subsidiaries by the purchase of all the issued shares of these companies. These companies were United Gas Limited and Hamilton By-Product Coke Ovens Limited. The first was a distributing company and the second was a company producing manufactured gas which it sold to the distributing company. I will refer to these three companies

[1] [1962] O.R. 162, 31 D.L.R. (2d) 331.

from now on as the holding company, the distributing company and the manufacturing company.

At incorporation the capital structure of the holding company was as follows:

	Authorized	*Issued*
Preferred shares, 6 per cent cumulative redeemable $100 par value	250,000	90,000
Common shares no par value	250,000	100,000

All the issued shares, 90,000 preferred and 100,000 common, were issued to a firm of investment dealers for a price of $8,250,000. The preferred shares were sold to the public and the investment dealer retained the 100,000 common shares. These shares, in 1930, it sold to Union Gas of Canada, hereinafter referred to as "Union Gas". This was a large company engaged in Western Ontario in the distribution and production of natural gas.

As there were 100,000 common shares and only 90,000 preference shares, which only had a vote after four quarterly dividends were in arrear, the control of the holding company was always vested in the holders of the common shares. Because of competitive conditions in the Hamilton area from another company, Dominion Natural Gas Company Limited, neither the distributing company nor the producing company prospered as they might otherwise have done. The result was that Union Gas, as controlling company, the distributing company and Dominion Natural Gas made an agreement to provide for the reorganization of the business, capital and affairs of the holding company. It is unnecessary to go into more detail about this inter-company agreement but in these reasons the reorganization of the capital structure of the holding company is important and it is necessary to deal with it in some detail.

The reorganization was approved by order of the Court on January 17, 1939, and embodied in supplementary letters patent dated February 7, 1939. Before its approval, the arrears of dividends on the preference shares amounted to $37. The holder of each 6 per cent preference share of the par value of $100 received as a result of the reorganization:

(i) 1 6 per cent cumulative redeemable class "A" preference share, par value $50;

(ii) 1 non-cumulative class "B" preference share, par value $25;

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(iii) a dividend of $2 cash per share, in full payment of $37 in accrued and unpaid dividends.

The preference shareholders gave up as a result of this reorganization:

(a) a capital amount of $25 per share, a total of $2,250,000;

(b) arrears of dividends of $35 per share, a total of $3,150,000, or a total of $5,400,000.

The following table shows the capital of the holding company before and after reorganization:

Before reorganization		*After reorganization*	
100,000 common shares no par value	$ 100,000	90,000 common shares, without nominal or par value	$ 50,000
90,000 preference shares, $100 par value	$ 9,000,000	90,000, 6 per cent cumulative redeemable class "A" preference shares of the par value of $50 each	$ 4,500,000
		90,000 non-cumulative class "B" preference shares of the par value of $25 each	$ 2,250,000
	$ 9,100,000		$ 6,800,000

I have set out these figures in detail because the obvious disparity between the concessions made by the preference shareholders and the common shareholders is urged by counsel for the appellants as a ground for the refusal of the winding-up order. But this reorganization was worked out in 1937 and 1938 and approved by the Court after full consideration in 1939, (*Re United Fuels Investments Limited*[1]). The dissenting vote was only about one-fortieth of the issued preference shares and the opposition on the motion for approval came from one individual, who did point out that the common shareholders were giving up very little.

I am concerned here with the rights of the holders of the class "B" preference shares on this reorganization. These rights and their inter-relation with the rights of the class

[1] [1939] O.W.N. 52, 1 D.L.R. 779.

"A" preference shares are set out in the supplementary letters patent as follows:

Clause (*a*) provides for a 6 per cent cumulative preferential dividend on the class "A" shares and for the non-payment of any dividends on the class "B" and common shares until all arrears of the class "A" shares have been paid.

Clause (*b*) provides for dividends on the class "B" and common shares in these terms:

(*b*) Subject to the rights of the holders of the Class "A" Preference Shares, the moneys of the Company properly applicable to the payment of dividends which the Directors may determine to distribute in any fiscal year of the Company by way of dividends shall be distributed among the holders of the Class "B" Preference Shares and the Common Shares pro rata according to the number of Shares held.

Clause (*c*) provides for the priorities of the class "A" shares on a liquidation, dissolution or winding-up, gives them an additional $10 per share if the winding-up is voluntary, and denies further participation in the assets.

Clause (*d*) then deals with the rights of the class "B" shares in the same events in these terms:

(*d*) Subject to the rights of the holders of Class "A" Preference Shares the holders of Class "B" Preference Shares shall have the right on the liquidation, dissolution or winding-up of the Company or other distribution of assets of the Company among Shareholders (other than by way of dividends out of moneys of the Company properly applicable to the payment of dividends) to repayment of the amount paid up on such Shares, and if such liquidation, dissolution, winding-up or distribution be voluntary, to an additional amount equal to $5 per Share before the holders of any of the Common Shares or any other Shares of the Company junior to the Class "B" Preference Shares shall be entitled to repayment of the amounts or any part thereof paid up on such Common Shares or other junior Shares or to participate in the assets of the Company, but the holders of the said Class "B" Preference Shares shall not have the right to any further participation in the assets of the Company.

Clause (*e*) provides for purchase in the market of both the class "A" and class "B" shares at certain prices in these terms:

(*e*) The Company, pursuant to Resolution of the Board of Directors, may at any time purchase in the market the whole or from time to time any part of the Class "A" Preference Shares outstanding at a price not exceeding $60 per Shares and unpaid cumulative dividends and costs of purchase, or of the Class "B" Preference Shares outstanding at a price not exceeding $30 per Share and Costs of purchase. From and after the date of purchase of any Class "A" Preference Shares or Class "B" Preference Shares under the authority in this paragraph contained, the Class "A"

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Preference Shares or Class "B" Preference Shares so purchased shall be deemed to be redeemed and shall be cancelled.

Clauses (*f*), (*g*) and (*h*) provide for the redemption of the class "A" shares at $60 per share on notice.

Clause (*i*) gives the class "A" shares a right to elect 2 directors if 8 quarterly dividends are in arrears and then deals with the voting rights of both class "A" and class "B" shares in these terms:

> Save as aforesaid, no holder of Class "A" Preference Shares shall have any right to vote at or receive notice of any Annual or Special General Meetings of the Company. No holder of Class "B" Preference Shares shall have any right to vote at or receive notice of any such meetings.

It will be seen that the class "A" shares are redeemable both by purchase and on notice. The class "B" shares are only redeemable by purchase. The only other way of paying them off is on a winding-up. The class "A" shares have but limited voting rights and the class "B" shares have none at all unless, as McLennan J. held, they have a right to vote on a winding-up.

When the arrangement was submitted to the shareholders a letter was sent by the President of Union Gas (the controlling company) which held the 100,000 common shares (he was also the President of United Fuels, the holding company) with the following explanation:

> From the foregoing and from the enclosed memorandum it will be seen that the proposed arrangement is not primarily a re-organization of capital as between the preferred and common shareholders but is a joint agreement by both classes of shareholders to give up certain rights in order to terminate a disastrous competitive situation with Dominion in the City of Hamilton.
>
> The carrying out of the agreement will enable United Gas to control and extend the sale and distribution of all gas now served in the Hamilton area . . .
>
> Under the proposed arrangement, the preferred shareholders will have a preference on dividends to the approximate amount earned on the average during the past ten years. However, their participation in earnings will not be limited as at present because, through the medium of the new Class "B" shares, the preferred shareholders are also enabled to participate equally share per share with the common shareholders in any further distribution made possible by increased earnings.

I will not concern myself any further with the history of the class "A" shares but between 1942 and 1945, United Fuels (the holding company) purchased for cancellation

20,311 class "B" shares, leaving outstanding 69,689 of these shares.

In July 1960, Union Gas, the controlling company, made an offer both to the class "A" and class "B" shareholders. I am not interested in the terms of the offer to the class "A" shareholders. They were redeemable on notice. The offer to the class "B" shareholders was two and a half common shares of Union Gas plus $2.50 for one United Fuel class "B". Ninety-eight per cent of the class "A" shareholders accepted but only 68 per cent of the class "B" shareholders accepted. The following table shows the particulars of the acceptances, the offer having remained open according to its terms until September 30, 1960:

	Shares Outstanding	*Shares Exchanged*	*Shares not Exchanged*
Class "A"	90,000	86,814	3,186
Class "B"	69,689	47,222	22,467

Then followed the winding-up proceedings. Union Gas requisitioned the summoning of a meeting for November 8, 1960, to pass a resolution to wind up the company. The company then sent out a notice to the common shareholders but not to the remaining class "A" or class "B" shareholders. Only the common shareholders attended and voted. The vote of the common shareholders was as follows: 89,920 votes for to 8 votes against, with 8 shares not voting. Of the "yes" votes, 89,906 were cast by Union Gas or its nominees. United Fuel then petitioned the Court under s. 10(*b*) of the *Winding-up Act* for a winding-up order. McLennan J. rejected the petition solely on the ground that although only the common shareholders are given voting rights by the letters patent, this does not govern a special meeting of shareholders under s. 10(*b*) of the *Winding-up Act* and that all shareholders, preferred as well as common, were entitled to notice and to vote at the meeting. The Court of Appeal took a different view. It was a unanimous judgment delivered by Schroeder J.A. They held that the preference shareholders were not entitled to a notice of the meeting and a vote, that the special meeting of shareholders referred to in s. 10(*b*) is simply a special general meeting of the shareholders within the meaning of s. 101 of the *Companies Act* and, hence, the holders of non-voting preference shares were not entitled to notice or to vote.

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They also held that where a majority of the common shareholders have passed a resolution under s. 10(*b*), any discretion the Court may have to refuse a winding-up order should not be exercised unless it can be shown that the action of the majority shareholders was fraudulent or equivalent to bad faith. Subject to this, the right to decide that a company should be wound up rests with the majority shareholders.

I agree with the judgment of the Court of Appeal that the preference shareholders were not entitled to notice of the meeting and a vote, and I have nothing to add to the reasons of Schroeder J.A. The main ground of appeal was that there exists in the Court an equitable jurisdiction, which in the circumstances of this case should be exercised against the winding-up order. The common shareholders submit that once they show a resolution of shareholders passed at a meeting properly called and conducted, they are entitled to a winding-up order or, in the alternative, if there is a discretion in the Court to refuse the order, it is exercisable only on very narrow grounds, which do not exist here.

Sections 10 and 13 of the *Winding-up Act* read:

> 10. The court may make a winding-up order,
>
> (*a*) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;
>
> (*b*) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up;
>
> (*c*) when the company is insolvent;
>
> (*d*) when the capital stock of the company is impaired to the extent of twenty-five per cent thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year; or
>
> (*e*) when the court is of opinion that for any other reason it is just and equitable that the company should be wound up.
>
> 13. The court may, on application for a winding-up order, make the order applied for, dismiss the petition with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just.

I am satisfied that there is some discretionary power under all the subsections with the exception of subs. (*a*).

If the charter has expired or the specified event has occurred a winding-up order must follow the application. There are, however, minor examples of the exercise of discretion under subss. (*b*), (*c*) and (*d*). There is a line of cases, beginning in 1894 and ending in 1918, set out in the footnote*, where the assets of an insolvent company were being administered under the *Assignments and Preferences Act*. The Courts asserted a jurisdiction to reject a creditor's petition for a winding-up order, even where the insolvency was clear, because the application was contrary to the wishes of the majority of the creditors and against convenience and economy in the administration of the assets.

Shareholders' petitions have been dismissed in cases apparently within the purview of the Act on the ground of triviality of interest and regard for the wishes of the majority.‡ I merely mention these cases in order to put them on one side, for they afford no help in this problem.

Nor do I think that *Symington v. Symington*[1] and *Loch v. John Blackwood Ltd.*[2], strongly relied upon in the respondent's submission, deal with this particular problem. These were concerned with the "just and equitable" subsection. Before they were decided it had been held in England that the "just and equitable" item was merely intended to include cases of the same kind as those covered in previous items of the section, (*In re Suburban Hotel Company*[3]). *Symington v. Symington* and *Loch v. John Blackwood Ltd.* deny this rule of construction and give subs. 10(*e*) an independent operation which has been widely recognized in a variety of situations. But this independent recognition of the scope of subs. 10(*e*) does not involve, as counsel for the respondent submitted, the denial of a "just and equitable jurisdiction" under subss. (*b*), (*c*) and (*d*).

The oddity of this case is that a winding-up order is

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* *Wakefield Rattan Co. v. Hamilton Whip Co.* (1894), 24 O.R. 107; *Re Maple Leaf Dairy Co.* (1901), 2 O.L.R. 590; *In re Strathy Wire Fence Co.* (1904), 8 O.L.R. 186; *Re Charles H. Davis Co. Limited* (1907), 9 O.W.R. 993; *Re Olympia Co.* (1915), 25 D.L.R. 620 (Man.); *Marsden v. Minnekahda Land Co.* (1918), 40 D.L.R. 76 (B.C.).

‡ *In re London Suburban Bank* (1871), L.R. 6 Ch. App. 641; *In re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104; *Re The Tomlin Patent Horse Shoe Co. Ltd.* (1886), 55 L.T. 314.

[1] (1905), 13 Sc. L.T. 509. [2] [1924] A.C. 783.

[3] (1867), L.R. 2 Ch. App. 737.

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sought for a very prosperous company. It was doing well until 1957 but with the bringing of natural gas into the area served by the company, a period of increasing prosperity and expansion began. The future looks very bright. The class "B" shareholders wish to retain their position and share in this prosperity with the common shareholders. The common shareholders wish to wind up the company and pay the class "B" shareholders off in accordance with the terms of the supplementary letters patent. The class "B" shares, with their right to participate in dividends, have some of the attributes of common shares but they are undoubtedly preference shares with defined rights on a winding-up.

The claims of the class "B" shareholders may be summarized as follows:

(*a*) That to the extent of their right to participate in dividends, they are in the same position as the common shareholders and should not be eliminated from the company. They assert a right to the continued existence of this company.

(*b*) That their sacrifices on the reorganization assured the continued existence of the company.

(*c*) That during the period 1947 to 1957, the company retained in the business for the purpose of expansion out of earnings the sum of $3,800,308. These earnings, if the company had not chosen to retain them, would have been available for the declaration of dividends to the "B" and common shareholders. A winding-up will deprive them of any participation in this accumulation.

The "B" shareholders also question the reason given by the common shareholders for the winding-up. Union Gas, the common shareholder, says that there is now no reason to continue United Fuel as a holding company with only one subsidiary. In 1959, because of the available supply of natural gas, the Coke company was sold. The result of a winding-up order will be to put all the assets of the holding company and its subsidiary distributing company into Union Gas after payment of all claims. There will undoubtedly be some saving and convenience of administration if this is done.

The "B" shareholders answer that this is not the true reason. United Fuel, the holding company, began as a company distributing gas as a result of the operations of two subsidiaries. It is still in the business of distributing gas through the operation of one subsidiary. This one subsidiary, instead of buying manufactured gas from another subsidiary, is buying it from an independent source, Ontario Natural Gas Storage, which happens to be a wholly owned subsidiary of Union Gas.

We have, therefore, on one hand an allegation of a "freeze-out"; on the other, a submission that convenience of administration justifies the winding-up, and that in any event, the common shareholders are entitled to wind it up. I think the material discloses a good deal of substance in the allegations of the class "B" shareholders concerning the reasons for winding up this company but does this make any difference? They are holders of preference shares. It is true that they are not redeemable by notice but there has always been the right to buy the shares for cancellation and there has always been what, to me, is a clear provision in the constitution of the company for their prior payment on a winding-up and a premium if the winding-up is voluntary.

What does voluntary winding-up mean in these supplementary letters patent? It appears in the conditions relating to the preference shares and the common shares. In a Canadian context it must include a petition based on a shareholders' resolution under s. 10(*b*), for the Canadian Act, in contrast to the English Act, does not recognize any winding-up outside the Act.

Therefore, when the reorganization was put through in 1939, the rights of the "B" shareholders were clearly ascertained. They were subject to redemption on a voluntary winding-up. The supplementary letters patent contemplated the possibility of a voluntary winding-up. It appears very doubtful whether in 1939 anyone thought of a voluntary winding-up because of prosperity but that cannot alter the meaning of the charter of the company.

I assume that Union Gas is exercising its right, as the common shareholder of this company, to wind up the company in its own self-interest and for convenience and economy of administration. Can a preference shareholder

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who wants the company to continue prevent this being done?

Where can one find a discretion to refuse a winding-up order on the application of a preference shareholder who does not want to be redeemed? It is a normal incident of preference shares that they are subject to redemption. It is true that the "B" shares in contrast to the "A" shares are not redeemable in the ordinary sense. It is also true that they resulted from a reorganization. But the "B" shareholders are really trying to tell the company that in its prosperity it must carry on indefinitely because of their right to participate in the common dividends. A dismissal of the petition would inevitably be an affirmation of this position and would put upon the supplementary letters patent a construction that they cannot bear, namely, that there can be no winding-up without the consent of the "B" shares. This is asking the Court to do what a shareholders' committee might well have tried to do at the time of the reorganization, if it had been able in 1938 to foresee conditions in 1958. If the company has the right to wind up now, as I think it has, the motives which were so strongly emphasized by counsel for the "B" shareholders have no relevance. Whenever a company chooses to redeem preference shares according to their terms, it is wasting time and effort unless the motive is self-interest.

Counsel for the class "B" shareholders relied on certain authorities in the United States relating to the dissolution of solvent, prosperous corporations. These cases are: *Theis v. Spokane Falls Gaslight Co.*[1]; *William B. Riker & Son Co. v. United Drug Co.*[2]; *In re Paine*[3]; *In re Doe Run Lead Co.*[4]; *In re Security Finance Co., Rouda v. Crocker*[5]. Without going into details, these cases are all concerned with a common problem, an attempt of a majority of common shareholders to get the assets of the corporation into

[1] (1904), 74 Pac. 1004; 34 Wash. 23 (Wash. C.A.).

[2] (1912), 82 A. 930 (N.J.C.A.).

[3] (1918), 166 N.W. 1036 (Mich. C.A.).

[4] (1920), 223 S.W. 600 (Mo. C.A.).

[5] (1957), 317 P. 2d 1 (Calif. C.A.) at p. 5.

another corporation in which they alone are interested and the minority is not, and to pay off the minority common shareholders in cash. This is an entirely different problem from the right to wind up for the purpose of redeeming preference shares.

The dangers inherent in the use of dissolution procedure in such a case are obvious. The first is that the assets may be sold by the majority to themselves under the cloak of a new corporation at an unfair price and the second is the denial to the minority of the opportunity to participate.

I am not overlooking the case of *Castello v. London General Omnibus Co. Ltd.*[1], referred to in the reasons for judgment of the Court of Appeal. In that case the Court of Appeal in England refused to restrain a sale of assets to another company exclusively owned by the majority in the old company and compelled the minority in the old company to take a cash payment. It is true that the cash payment was, on its face, a very generous one but the shareholders did not want cash. They wanted to stay with the company instead of being paid off. The case is referred to with approval in the judgment of the Court of Appeal but it is not the present case and I do not think it should receive approval in this Court. As far as I can see, it has never been referred to in any English or Canadian text and has never been judicially noticed either in England or in Canada.

I would dismiss the appeal with costs, including the costs of the application for leave to appeal.

Appeal dismissed with costs, including the costs of the application for leave to appeal.

Solicitors for the appellants: Wright & McTaggart, Toronto.

Solicitors for the respondent: Blake, Cassells & Graydon, Toronto.

[1] (1912), 107 L.T. 575.

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*Apr. 23, 24, 25, 26
Oct. 2

C. H. BOEHRINGER SOHN (*Plaintiff*) ..APPELLANT;

AND

BELL-CRAIG LIMITED (*Defendant*) ...RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Action for infringement—Claims for substances produced by chemical process and intended for food or medicine—Claim for substance only when produced by particular process of manufacture—Valid process claim also required—Patent Act, R.S.C. 1952, c. 203, s. 41(1), (2) and (3).

The appellant was the owner of a patent for an invention entitled "Process for the production of Substituted Morpholines" and brought action against the respondent for infringement of this patent, claiming that the respondent by selling phenmetrazine hydrochloride tablets, had infringed claim 8 of the patent, which read: "2-phenyl-3-methylmorpholine, when prepared by the process of claim 1, 2 or 3, or by an obvious chemical equivalent." The appellant's claim was based upon this claim 8, referring only to process claim 1. The respondent attacked the validity of the claim and also denied infringement. The trial judge found that claim 8 was invalid for failure by the appellant to comply with the requirements of s. 41(1) of the *Patent Act*, R.S.C. 1952, c. 203. He also held that claim 8 had not been infringed.

Held: The appeal should be dismissed.

As found by the trial judge, claim 1 was invalid because, on the evidence, it was improbable that all, or the majority, or even a substantial number of the conceivable substances comprised within the class defined in that claim had the utility referred to in the specification.

The question was whether a claimant can satisfy the requirements of s. 41(1) for a claim for a substance, if he has filed a broad process claim for the production of a whole genus of which the substance is but one, if the process claim, because of its generality, is found to be invalid. The Court held that he cannot meet the provisions of the subsection in that way. The subsection was intended to place strict limitations upon claims for substances produced by chemical process intended for food or medicine. Such a substance cannot be claimed by itself. It can only be claimed when produced by a particular process of manufacture. Not only that, the claimant must claim, not only the substance, but that very process by which it is manufactured. To comply with the subsection he must, therefore, make two claims. This meant that he must make valid claims to both the process and the substance, if he is to be entitled, successfully, to claim the latter.

Commissioner of Patents v. Winthrop Chemical Co. Inc., [1948] S.C.R. 46, applied.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], dismissing an action for infringement of patent. Appeal dismissed.

*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

[1] [1962] Ex. C.R. 201, 22 Fox Pat. C. 190.

Christopher Robinson, Q.C., and *R. S. Smart*, for the plaintiff, appellant.

J. J. Robinette, Q.C., and *I. Goldsmith*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The facts of this case are fully set forth in the careful and comprehensive judgment of the learned trial judge, which is reported in [1962] Ex. C.R. 201. It is not necessary, for the purposes of this decision, to repeat them here in detail. The action is by the appellant against the respondent for infringement of the appellant's patent, claiming that the respondent, by selling phenmetrazine hydrochloride tablets, had infringed claim 8 of the patent, which read:

> 8. 2-phenyl-3-methylmorpholine, when prepared by the process of claim 1, 2 or 3, or by an obvious chemical equivalent.

The appellant's claim was based upon this claim 8, referring only to process claim 1.

The material contents of the patent are summarized in the headnote to the report of the case, in 22 Fox Pat. C. 190, as follows:

> Patent No. 543,559 of July 15, 1957, after referring to the known production of substituted morpholines by treating diethanolamines with acids to effect ring closure, and stating the object of the invention to be a process in which ring closure could be carried out under mild conditions, stated the discovery that a specified class of diethanolamines could be ring closed under particularly mild conditions and that the invention related to a process in which diethanolamines of the specified class were ring closed to morpholines by treatment with concentrated sulphuric acid without heating or with dilute acids at moderate temperatures. It then went on to say that "the morpholines produced according to the invention" were valuable pharmaceuticals and to describe their pharmacological behaviour "by the example of one of the compounds of this class, the 2-phenyl-3-methylmorpholine" (known by the generic name phenmetrazine). Nine examples described the preparation of different members of the class, Examples 2 and 9 describing the preparation of phenmetrazine by two specific processes. Claim 1 was to a process for the production of the defined class of substituted morpholines characterized in that diethanolamines of the defined class are treated in the presence of acids. There were five dependent process claims, a broad product claim to morpholines of the defined class prepared by the claimed process, and finally claim 8 . . .

The respondent attacked the validity of the claim and also denied infringement.

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The learned trial judge, for various reasons, found that claim 8 was invalid for failure by the appellant to comply with the requirements of s. 41(1) of the *Patent Act*, R.S.C. 1952, c. 203. He also held that claim 8 had not been infringed.

Having reached the conclusion that claim 8 was invalid for failure to comply with s. 41(1), for one of the reasons found by the learned trial judge, it is unnecessary to consider, or express an opinion upon, the other grounds upon which he dismissed the action.

The relevant subsections of s. 41 of the *Patent Act* provide as follows:

> 41. (1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.
>
> (2) In an action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary, be deemed to have been produced by the patented process.
>
> (3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

The following passages from the reasons for judgment of the learned trial judge state the proposition of law upon which, in my opinion, it must be found that claim 8 was invalid:

> It follows from the foregoing that a patent which includes in its specification a claim which claims more than the inventor has invented purports to grant an exclusive property in more than the inventor has invented and at least in so far as that claim is concerned the patent, in my opinion, is not granted under the authority of the statute and is therefore not lawfully obtained. I think it also follows (even allowing for full scope for the operation of s. 60) that no rights whatever can accrue to the patentee from the presence in the specification of such a claim, either for the purpose of enforcing the property rights thereby purported to be granted or for the purpose of fulfilling a statutory requirement such as that in s. 41(1) that a claim for a new substance in a patent to which that subsection applies be limited to the substance when produced by a process

which has been "claimed". For as I view it, a claim which is invalid because it claims more than the inventor invented is an outlaw and its existence as defining the grant of a property right is not to be recognized as having any validity or effect. Nor is there in the statute any provision for separating what may be good in such a claim, in the sense of what is in accordance with the statute, from what is bad in it, in the sense of what is contrary to or unauthorized by the statute.

* * *

I am accordingly of the opinion that if claim 1 is invalid, it cannot serve to fill the requirement of s. 41(1) that a claim for a new substance in a patent to which that subsection applies be accompanied by a claim for the process of producing the substance and be limited to the substance when produced by that process or an obvious chemical equivalent. In this view, the defendant's objections to claim 1 are relevant to the issue of the validity of claim 8.

The learned trial judge went on to hold that claim 1 was invalid because, on the evidence, it was improbable that all, or the majority, or even a substantial number of the conceivable substances comprised within the class defined in that claim had the utility referred to in the specification. This finding of the learned trial judge was not challenged before this Court and it was conceded, by counsel for the appellant, that claim 1 was too broad in its terms and was invalid for the reasons given by the learned trial judge.

The starting point for the consideration of this issue must be the decision of this Court in *Commissioner of Patents v. Winthrop Chemical Co. Inc.*[1]. It was held in that case that a claim for a substance alone cannot, under s. 41(1) (then s. 40(1)) of the *Patent Act,* be entertained and that the applicant's specification should describe the method or process by which the substance is prepared or produced and claim a patent therefor in the manner specified in s. 36 (then s. 35).

Counsel for the appellant contends that this decision goes no further than to hold that, as a matter of statutory interpretation, s. 41 requires a separate claim to be made for the process by which the substance is produced. This, he submits, was done in the present case, because the process claim in claim 1 was for a process applicable to the preparation of the specific substance of claim 8, *i.e.,* 2-phenyl-3-methylmorpholine, which process was incorporated, by reference, into claim 8. Claim 8, he says, if rewritten to

[1] [1948] S.C.R. 46, 2 D.L.R. 561, 7 Fox Pat. C. 183, 7 C.P.R. 58.

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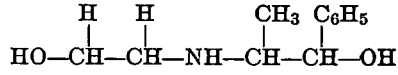
include a statement of the process directly rather than by reference, would read:

> 2-phenyl-3-methylmorpholine, when prepared by a process characterized in that a diethanolamine of the formula
>
> 
>
> is treated in the presence of acids, or by an obvious chemical equivalent.

He also points out that a patent was, in fact, issued and contends that the requirements of the *Winthrop* case have been met if the process has been claimed and that claim has been accepted by the Commissioner of Patents.

It should first be noted that claim 8, even if it had been drafted in the way suggested, if it had stood alone would have been invalid. In the *Winthrop* case there was a recital, in both the description and the claim portions of the specification, of the process by which the claimed substance was produced. There was, however, no claim for that process and the case decided that compliance with s. 41(1) required that such a claim be made.

In the present case there was a claim to a process upon which the appellant relies as being a compliance with the subsection. That claim is claim 1, which is admittedly invalid because it is too broad in its terms and claims more than the appellant was entitled to claim. The question is whether a claimant can satisfy the requirements of s. 41(1) for a claim for a substance, if he has filed a broad process claim for the production of a whole genus of which the substance claimed is but one, if the process claim, because of its generality, is found to be invalid.

In my opinion, he cannot meet the provisions of that subsection in that way. The subsection was intended to place strict limitations upon claims for substances produced by chemical process intended for food or medicine. Such a substance cannot be claimed by itself. It can only be claimed when produced by a particular process of manufacture. Not only that, the claimant must claim, not only the substance, but that very process by which it is manufactured. To comply with the subsection he must, therefore, make two claims. In my opinion this means that he must make valid claims to both the process and the substance, if

he is to be entitled, successfully, to claim the latter. To interpret the subsection as meaning that all that is necessary is to file a claim for the process, valid or not, would be to defeat its purpose. A person who claims a substance within the subsection, supported only by a process claim which is invalid, is in no better position than was the respondent in the *Winthrop* case, who, while referring to a process, had not claimed it. In the *Winthrop* case the claimant had claimed too little. In the present case he has claimed too much. But the result in each case is the same in that there has been no claim filed which results in the claimant's obtaining a valid patented process for the production of the substance which he claims.

The view which I have expressed as to the effect of s. 41(1) is, I think, implicit in the reasons for judgment given by this Court in that case and I agree with the view of the learned trial judge in the present case when he said:

> Nor do I think the effect of the judgment in the *Winthrop* case is so limited as Mr. Robinson submits. The case holds that in a case to which s. 41(1) applies, a claim for a new substance must be accompanied by a claim for a process for producing it, but it is, I think, impossible to read the judgment as meaning that a claim for an exclusive property to which the inventor was not entitled and which was therefore illegal and invalid could serve the purpose.

In the *Winthrop* case this Court, in determining the meaning of subs. (1), obtained assistance from the provisions of subss. (2) and (3), which immediately follow it. I think that similar assistance can be obtained in determining the issue in the present case.

Subsection (2) creates a statutory onus of proof, which applies in actions for infringement of patents relating to the production of a new substance. It provides that any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary, "be deemed to have been produced by *the patented process.*"

Subsection (3) provides, in the case of a patent for an invention intended or capable of being used for the preparation or production of food or medicine, for the granting of a licence, by the Commissioner of Patents, for the use of "the invention" for the purpose of the preparation of the food or medicine, and it provides for the fixing by him of a royalty, or consideration, to be paid for such licence.

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In the *Winthrop* case, Estey J., who delivered the judgment of the Chief Justice and himself, made the following reference to subs. (2) of what was then s. 40 of the Act, at p. 49:

> Moreover, this construction of section 40(1) is consonant with the use of the phrase "patented process" in 40(2). In this subsection Parliament is raising a presumption in favour of a plaintiff with respect to one of the essentials that must be proved in an action for infringement of his patent under section 40(1). In this regard Parliament speaks only of the "patented process", which emphasizes the construction already placed upon section 40(1). These subsections read together contemplate among the possible actions one for an infringement with respect to the process in which the substance is new but not patented but do not contemplate a patent for a substance only.

Kellock J., who delivered the judgment of Taschereau J. (as he then was) and himself, makes the following comments with respect to both subss. (2) and (3) at p. 53:

> By subsection 2 it is provided that in an action for infringement of a patent where the invention relates to the "production" of a new substance, any substance of the same chemical composition and constitution is, in the absence of contrary proof, to be deemed to have been produced by the *patented* process. If the respondent is right in its contention as to the construction of subsection 1, subsection 2 would have no application to a substance within subsection 1 produced by a process not itself the subject of patent. I think it unlikely that such a result was ever intended but rather that the provisions of the two subsections are supplementary.
>
> Again when one turns to subsection 3, the same consideration appears. It provides that in the case of a patent for an invention intended for or capable of being used "for the preparation or production" of food or medicine, the Commissioner of Patents has power to grant a licence to an applicant therefor limited to the "use of the invention for the preparation or production" of food or medicine (i.e. the process) and it is declared that in settling the terms of the licence regard shall be had to the desirability of making the food or medicine (i.e. the substance) available to the public at a proper price. Under this provision it is the *invention* which is to be the subject of the licence and it is the *process* which is referred to by the subsection as the invention. If, therefore, subsection 1 is to be interpreted as applying to a substance produced by a process which need not be patentable, no licence could be obtained under subsection 3 for its production. In my opinion no such effect was intended by the legislation.

Rand J., at p. 56, also called in aid the provisions of subss. (2) and (3) and said:

> I agree that ss. (2) could, as a matter of words, be construed to have only a partial application, limited to those cases in which the process itself is patented; but why, if under ss. (1) the process may be old, in the

juxtaposition of the two subsections, the procedural benefit should not have been extended to the patentee of a substance restricted in production to an old process, has not been made apparent. I agree, also, that under ss. (3) a license for the process may be deemed to imply a license for the substance itself where that likewise is the subject of patent; but if the substance could be patented along with an old process, it would be a distortion of language to say that a license could issue for the substance alone and the declared purpose of the subsection would be defeated.

In my opinion, the reasoning in each of these passages quoted applies with equal force, not only to the specific issue before the Court in the *Winthrop* case, *i.e.*, must an applicant for a patent for a substance under s. 41(1) make a specific process claim, but also to the issue which is before the Court in this case, *i.e.*, can there be a valid patent for a substance within s. 41(1) if the process claim which has been made for the process of its production is found to be invalid.

For the foregoing reasons, in my opinion, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Smart & Biggar, Ottawa.

Solicitors for the defendant, respondent: Duncan, Goldsmith, Doran & Caswell, Toronto.

1962
*Oct. 31
Nov. 1

1963
**Mar. 7

JOSEPH BEAUDRY (*Défendeur*) .....APPELANT;

ET

LEWIS V. RANDALL (*Demandeur*) .....INTIMÉ.

TRUST GÉNÉRAL DU CANADA (*Défenderesse*) ..... APPELANTE;

ET

LEWIS V. RANDALL (*Demandeur*) .....INTIMÉ.

JOSEPH BEAUDRY (*Défendeur*) .....APPELANT;

ET

LEWIS V. RANDALL (*Demandeur*) .....INTIMÉ.

LEWIS V. RANDALL (*Demandeur*) .....APPELANT;

ET

TRUST GÉNÉRAL DU CANADA (*Défenderesse*) ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Contrat—Option d'achat—Actions de compagnie—Dépôt d'actions à une compagnie de fidéicommis pour être livrées sur paiement du prix—Révocation unilatérale avant expiration du terme—Refus de livraison—Action en dommages—Intérêts—Stipulation pour autrui—Responsabilité solidaire—Code Civil, arts. 1029, 1065.

Les défendeurs Beaudry et Butler accordèrent au demandeur une option d'un an pour acheter en tout ou en partie un certain nombre de parts du capital actions d'une compagnie aux prix de $5 l'unité. Ces parts, tel que mentionné dans l'option, furent déposées entre les mains d'une compagnie de fidéicommis, le Trust Général du Canada, qui avisa le demandeur du dépôt et du fait qu'elles seraient détenues par elle selon les termes de l'option. Six mois plus tard, le défendeur Butler, par lettre enregistrée, avisa le demandeur que l'option était révoquée. Copie de cette lettre fut aussi adressée au fidéicommis. Le demandeur, accompagné d'un notaire, se présenta immédiatement aux bureaux du

*CORAM: Le Juge en chef Kerwin et les Juges Taschereau, Cartwright, Fauteux et Abbott.

**Le Juge en chef Kerwin est décédé avant le prononcé du jugement.

fidéicommis, offrit l'argent et réclama la livraison des parts, ce qui fut refusé. Le demandeur intenta une action pour dommages-intérêts au montant de $72,000, étant la différence entre le prix prévu et le prix supérieur prévalant à ce moment à la bourse. Cette action ne procéda éventuellement que contre Beaudry et le fidéicommis.

Le juge de première instance évalua les dommages à $68,500, et l'action fut maintenue pour ce montant. Par un jugement majoritaire, la Cour d'appel modifia ce jugement pour condamner conjointement et solidairement les deux défendeurs pour le tout. Les défendeurs et le demandeur aussi appelèrent à cette Cour.

Arrêt: Les appels doivent être rejetés.

L'entente entre les parties étant devenue, tel que voulu, une entente tripartite, ne pouvait être révoquée sans l'intervention du demandeur. Indivisible, elle avait le double objet de consacrer une option unilatéralement irrévocable, et de consacrer l'obligation du fidéicommis d'en assurer l'exercice éventuel. Il ne peut donc être question d'une stipulation pour autrui au bénéfice du demandeur puisqu'il était partie à cette entente. C'est donc à bon droit qu'on a jugé que Beaudry et Butler n'avaient aucun droit de révoquer, que le fidéicommis était tenu de livrer les actions lors de l'offre de paiement et qu'il y avait eu rupture de contrat engageant la responsabilité des défendeurs. Cette responsabilité était conjointe et solidaire puisque la transaction était commerciale et sa révocation dolosive. Il n'apparaît au dossier aucune raison pour modifier le quantum des dommages.

Il n'y avait pas lieu de demander la résolution de la vente, puisque la vente n'a jamais eu lieu. L'offre d'achat n'a pas été acceptée. L'action en dommages pour cause de révocation de l'option était donc bien fondée. Le demandeur avait le choix soit d'opter pour la possession des actions soit de demander des dommages-intérêts.

APPELS de trois jugements de la Cour du banc de la reine, province de Québec[1], modifiant en partie un jugement du Juge Smith. Appels rejetés.

Edouard Masson, C.R., pour le défendeur Beaudry.

Antoine Geoffrion, C.R., et *G. Laurendeau, C.R.*, pour la défenderesse Trust Général du Canada.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—En août 1956, Joseph Beaudry et C. J. Butler, principaux intéressés d'Aconic Mining Corporation, accordaient à Lewis V. Randall une option pour acheter 20,000 parts du capital actions de cette compagnie au prix de $5 l'unité. La considération, le terme et les conditions de cette option, aussi bien que la procédure adoptée pour son exercice, sont consignés dans la lettre ci-après, datée le 29 août 1956, signée par Beaudry et Butler et remise par ce dernier à Randall, au bureau même de la compagnie:

[1] [1962] B.R. 577.

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Fauteux J.

ACONIC MINING CORPORATION
The Canada Building
Craig at Victoria Square
Montreal 1

Telephone: UNiversity 6-6882
Cable: Coaconic
29 August, 1956

Mr. L. V. Randall,
1374 Sherbrooke Street, West,
Suite "A",
Montreal, Que.

Dear Mr. Randall,

This will confirm that in recognition of your continued cooperation and assistance in the financing of Aconic Mining Corporation to major production, we, the undersigned, Joseph Beaudry and C. J. Butler, do hereby grant to you an option to purchase twenty thousand (20,000) shares of Aconic Mining Corporation, Capital Stock, at a price of $5.00 per share.

This option shall be valid for a period of one year from today's date. We will leave on deposit with the General Trust of Canada, 84 Notre Dame Street, West, Montreal, the said 20,000 shares which can be picked up anytime within the said period of one year, upon payment to the General Trust of Canada, for the account of Joseph Beaudry and C. J. Butler, $5.00 per share for the stock being taken down, and the General Trust of Canada is hereby authorized to issue this stock to you, upon receipt of payment for same.

We request the General Trust to notify you when they are in receipt of the 20,000 shares and that they are holding same in accordance with this letter.

Yours very truly,
JOSEPH BEAUDRY,
C. J. BUTLER,

Quelques jours plus tard, le 4 septembre 1956, Beaudry et Butler précisaient dans une lettre adressée à Randall leur accord sur son droit d'exercer cette option, soit pour la totalité ou soit pour partie seulement des 20,000 parts et ce, jusqu'au 29 août 1957:

ACONIC MINING CORPORATION
The Canada Building
Craig at Victoria Square
Montreal 1

Telephone: UNiversity 6-6882
Cable: Coaconic
4 September, 1956.

Mr. L. V. Randall,
1374 Sherbrooke Street, West,
Suite "A",
Montreal, Que.

Dear Mr. Randall,

With reference to our letter of the 29th August, 1956, regarding the option for 20,000 shares of capital stock of Aconic Mining Corporation at $5.00 per share, we, Joseph Beaudry and C. J. Butler, agree that you have the right to take down the whole or any part of these said 20,000 shares prior to the 29th August, 1957.

Yours very truly,
JOSEPH BEAUDRY,
C. J. BUTLER,

Par la suite, Randall reçut par courrier, à son adresse à Montréal, une lettre du Trust Général du Canada dûment signée par Oscar Lauzon, gérant de la division des «corporate trusts», l'avisant que copie de la lettre du 29 août 1956 leur avait été transmise, que les 20,000 parts en question avaient été déposées en leurs mains et que ces parts seraient détenues par eux selon les termes de la lettre du 29 août 1956. Cette lettre du Trust Général du Canada, en date du 3 octobre 1956, se lit comme suit:

TRUST GENERAL DU CANADA
GENERAL TRUST OF CANADA
84 ouest, rue Notre-Dame
Notre-Dame Street West,
(Place d'Armes)
Marquette 9422

Casier postal
P.O. Box No. 968
Place d'Armes

Montréal 1, October 3rd 1956.

Mr. L. V. Randall,
1374 Sherbrooke Street West,
Suite "A",
Montreal, Que.

Dear Sir:

We wish to inform you that we have been transmitted copy of a letter dated August 29th 1956, by Messrs. Joseph Beaudry and C. J. Butler and yourself, regarding one option to purchase twenty thousand (20,000) shares of Aconic Mining Corporation.

We also wish to confirm that these shares have been deposited with us, and will be held according to the terms of this letter.

We beg to remain,

Yours very truly,

O. LAUZON,
Oscar Lauzon, Manager,
Corporate Trusts Department.

Quelque six mois plus tard et avant l'expiration du terme fixé pour l'exercice de l'option, Butler adressait, sous pli recommandé, la lettre suivante à Randall:

C O P Y

ACONIC MINING CORPORATION
(personal)

14 March, 1957.

BY REGISTERED MAIL
Mr. L. V. Randall,
1374 Sherbrooke Street, West,
Suite "A",
Montreal, Que.

Dear Sir:

Please be advised that your option to purchase 20,000 shares of Aconic Mining Corporation capital stock at $5.00 per share, under date of August 29th, 1956, is hereby cancelled due to your failure to provide the

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promised cooperation and assistance in securing senior financing for Aconic Mining Corporation, and the General Trust of Canada is being advised accordingly.

Yours very truly,

C. J. BUTLER

Registered copy to
General Trust of Canada.

(Pencil Note): No-62826

Copie de cette lettre, adressée au Trust Général du Canada, fut reçue par Oscar Lauzon, le gérant de la division d'administration concernée.

Le lendemain, 15 mars, Randall se présenta au bureau du Trust Général du Canada, accompagné du notaire John Everett Todd qui, s'adressant au président de l'institution, lui offrit en bonne et due forme la somme de $100,000 et réclama la livraison des 20,000 parts. A ce protêt, celui-ci répondit:—«I cannot do it at the present time owing to the revocation of Mr. Randall's option by Mr. Butler»; et, requis par le notaire de signer sa réponse, il refusa de ce faire. C'est alors que Randall s'adressa aux tribunaux.

Dans son action intentée une quinzaine de jours plus tard contre Beaudry, Butler, le Trust Général du Canada et Aconic Mining Corporation, il invoqua les faits ci-dessus et demanda à ce que tous les défendeurs soient condamnés conjointement et solidairement à lui payer, à titre de dommages résultant de rupture de contrat, la somme de $72,000, différence entre le prix prévu à l'option et subséquemment offert, et le prix supérieur prévalant à ce temps à la Bourse pour les 20,000 actions.

Cette action en justice ne procéda éventuellement que contre Beaudry et le Trust Général du Canada; Randall s'en étant désisté dans le cas d'Aconic Mining Corporation et Butler ayant fait cession de ses biens.

En défense, Beaudry, d'une part, plaida principalement que l'option était révocable en aucun temps; que donnée en considération de services à rendre et subséquemment non rendus, elle avait été validement révoquée et qu'aucuns dommages n'avaient été subis par Randall par suite de cette révocation. De son côté, le Trust Général du Canada soumit en substance qu'il était simplement dépositaire de ces actions, qu'il n'avait commis aucune faute, qu'il n'avait

contracté aucune obligation à l'endroit de Randall et qu'entre ce dernier et le Trust Général du Canada, il n'y avait aucun lien de droit.

A l'enquête, la preuve faite par les parties et retenue par le Juge de première instance se limite, à vrai dire, à la preuve orale faite pour établir les dommages et aux écrits ci-dessus reproduits, auxquels écrits les parties ont donné une interprétation différente pour en tirer, en droit, des conclusions opposées.

Dans un jugement très élaboré, M. le Juge Smith, de la Cour supérieure, jugea en somme que l'option donnée à Randall n'avait jamais été révoquée légalement; que le Trust Général du Canada avait assumé des obligations, non seulement envers Beaudry et Butler mais également à l'égard de Randall; qu'il ne pouvait se libérer de ces obligations en l'absence du consentement de ce dernier à la révocation de l'option; que le Trust Général du Canada était tenu de livrer les 20,000 actions lorsque lui fut faite l'offre de paiement de la somme de $100,000; et qu'il y avait eu, de la part des défendeurs, rupture de contrat engageant leur responsabilité pour les dommages en résultant. Considérant la différence entre le prix de $5 l'unité, prévu à l'option, et le prix moyen de $8.42½ prévalant, dans ses vues, sur le marché aux 14 et 15 mars 1957, il évalua les dommages à la somme de $68,500. Enfin, étant d'avis que la transaction entre Beaudry et Butler, d'une part, et Randall, d'autre part, n'était pas d'une nature commerciale, il condamna le Trust Général du Canada à payer au demandeur $68,500 avec intérêts, dont $34,250 conjointement et solidairement avec Beaudry, montant au paiement duquel celui-ci fut lui-même condamné.

De ce jugement, il y eut trois appels, celui de Beaudry et celui du Trust Général du Canada, tous deux pour obtenir le rejet de l'action de Randall, et celui de Randall contre Beaudry et le Trust Général du Canada pour obtenir une augmentation du montant accordé, en première instance, pour dommages, et une condamnation conjointe et solidaire des deux défendeurs pour le tout.

Par un jugement majoritaire, la Cour d'Appel[1] rejeta les deux premiers appels et accueillit en partie le troisième,

[1] [1962] B.R. 577.

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pour modifier, tel que demandé, la nature de la condamnation.

Des notes très détaillées fournies par chacun des Juges apparaît leur accord à déclarer, comme l'avait fait le Juge de première instance, que sans l'assentiment de Randall, l'option qui lui avait été donnée par Beaudry et Butler ne pouvait être validement révoquée et que le Trust Général du Canada avait, au moment où on lui offrit la somme de $100,000, l'obligation de livrer les 20,000 parts. MM. les Juges Hyde, Taschereau et Choquette, de la majorité, furent en outre d'avis que Randall n'était pas tenu, contrairement à la prétention des défendeurs-appelants, de conclure à la résolution du contrat pour obtenir les dommages; que la transaction intervenue étant de nature commerciale et la révocation de l'option étant dolosive, les défendeurs devaient être condamnés conjointement et solidairement au paiement de tous les dommages; que le montant accordé à ce titre par le Juge de première instance était justifié par la preuve et qu'il n'y avait pas lieu de le modifier.

Dissidents, MM. les Juges Rinfret et Badeaux furent d'avis que Randall aurait dû demander la résolution des ententes intervenues et que le défaut de ce faire ne permettait pas de faire droit à l'action en dommages qu'il avait prise contre les défendeurs. Dans ces vues, n'ayant pas à considérer les autres questions, ils auraient maintenu les appels de Beaudry et du Trust Général du Canada et renvoyé celui de Randall.

Ces trois jugements de la Cour d'Appel ont donné lieu à quatre pourvois devant cette Cour: celui de Beaudry et celui du Trust Général du Canada pour faire infirmer le jugement rejetant leur appel respectif, celui de Beaudry à l'encontre du jugement accueillant en partie l'appel de Randall, et celui de Randall pour obtenir cette augmentation du montant des dommages que la Cour du banc de la reine refusa de lui accorder sur son appel du jugement de première instance.

La question fondamentale à déterminer est évidemment celle de la portée des engagements assumés dans les circonstances par Beaudry et Butler et par le Trust Général du Canada par suite des lettres du 29 août et du 3 octobre 1956.

La première de ces lettres, de Beaudry et Butler à Randall, est, en termes exprès, confirmative de pourparlers et d'un accord de volonté préalablement intervenus entre ces trois personnes. Suivant cet accord, Beaudry et Butler donnent à Randall, en considération des services par lui rendus à Aconic Mining Corporation, le droit, valable pour un an à compter du 29 août 1956, d'acheter, s'il le désire et au moment de son choix, 20,000 actions d'Aconic Mining Corporation, au prix de $5 l'unité; et pour assurer évidemment l'exercice éventuel de ce droit, on pourvoit à l'entiercement des actions entre les mains du Trust Général du Canada requis, dès que mis en possession, d'en aviser Randall et de lui signifier en outre son acceptation de la mission qu'on entend lui confier. Cette lettre, constitutive (i) du titre permettant à Randall d'exiger du Trust Général du Canada et (ii) de l'autorité du Trust Général du Canada de faire la livraison de ces actions sur offre du paiement du prix dans le délai imparti, fut remise de main à main par Butler à Randall l'acceptant, au bureau même d'Aconic Mining Corporation où elle apparaît avoir été faite et signée.

Par la seconde lettre, celle du 3 octobre suivant, le Trust Général du Canada avise Randall de la réception de copie de la lettre du 29 août «*by Messrs. Joseph Beaudry and C. J. Butler and yourself*», de la réception des actions, et lui signifie, tel que requis, l'acceptation de la mission qui lui est confiée; le tout étant en parfaite exécution des termes de la lettre du 29 août 1956.

Ainsi donc, les parties à l'entente confirmée par la lettre du 29 août 1956, ont jugé opportun et convenu, pour en assurer l'exécution éventuelle, de recourir à l'intervention d'un tiers, soit le Trust Général du Canada. Le Trust, fidèlement instruit de cette entente en recevant copie même de cette lettre, accéda à leur demande et signifia son assentiment à Beaudry et Butler par l'acceptation des actions et à Randall par sa lettre du 3 octobre. Dès lors, l'entente devenait, tel que voulu, une entente tripartite. Cette entente tripartite ne pouvait, sans l'intervention de Randall, être révoquée. Indivisible, elle avait un double objet, (i) consacrer une option,—de sa nature irrévocable sans l'assentiment de Randall, ainsi qu'en ont jugé le Juge de première

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instance et tous les Juges de la Cour d'Appel en s'appuyant sur une doctrine depuis longtemps arrêtée,—et (ii) consacrer l'obligation du Trust Général du Canada, où on entierça les actions, d'assurer l'exercice éventuel de cette option irrévocable. Dans ces vues, il ne peut être question, à mon avis, d'une stipulation pour autrui au bénéfice de Randall puisqu'il était partie à cette entente. On ne peut davantage avoir intérêt à poursuivre la question pour déterminer dans quelle mesure l'obligation ainsi assumée par le Trust participe des contrats de dépôt ou de mandat dont elle peut emprunter quelques-uns des éléments sans nécessairement tous les contenir; l'intention des parties contractantes est claire et doit recevoir son effet. Telle est, en somme, la portée des engagements assumés dans les circonstances par Beaudry et Butler et par le Trust Général du Canada par suite des lettres du 29 août et du 3 octobre 1956. C'est donc à bon droit que la Cour Supérieure et la Cour d'Appel ont jugé que Beaudry et Butler n'avaient aucun droit de révoquer l'option, que le Trust Général du Canada était tenu de livrer les actions au moment où paiement lui en fut offert, et qu'il y avait eu de leur part rupture de contrat engageant leur responsabilité pour les dommages en résultant. Beaudry prétend échapper à la responsabilité parce que la lettre de la révocation de l'option ne fut signée que par Butler; cette prétention ne peut être retenue; il a donné son accord à cette révocation, ainsi qu'il appert de ses admissions aux plaidoiries.

Partageant également l'avis exprimé en Cour d'Appel que la transaction intervenue était de nature commerciale et que la révocation de l'option était, dans les circonstances, dolosive, il s'ensuit, comme on a jugé, que Beaudry et Butler sont conjointement et solidairement responsables, avec le Trust Général du Canada, de tous les dommages.

Randall, par son action, réclama $72,000 à titre de dommages, en adoptant, comme mesure de son préjudice, la différence, soit $3.60, entre le prix unitaire établi à l'option et celui prévalant au marché le 18 mars 1957, cette date étant, suivant lui, le premier jour où il lui était possible de vendre ces actions. Le Juge de première instance aurait préféré prendre en considération le prix du marché obtenant à la date de la levée de l'option, soit le 15 mars, mais en

l'absence de preuve du prix pour cette date, il a pris en considération le prix moyen de $8.42½ payé pour les 17,925 actions transigées à la Bourse le 14 mars, jour de la révocation de l'option, et accorda ainsi la somme de $68,500. En Cour d'Appel, seuls les Juges de la majorité eurent à considérer la question. S'appuyant particulièrement sur les raisons du Juge Migneault dans *The Mile End Milling Company v. Peterborough Cereal Company*[1], ils ont approuvé la méthode d'évaluation du préjudice suivie par le Juge au procès et donné, de plus, leur accord au montant auquel celui-ci s'était arrêté. Au regard du dossier, il n'apparaît aucune raison d'intervenir pour modifier cette évaluation du préjudice de Randall.

Reste à considérer la prétention, retenue en appel par les Juges dissidents, que Randall ne peut obtenir de dommages-intérêts pour rupture de contrat parce qu'il n'a pas conclu, dans son action, à la résolution de ce contrat.

La fidèle exécution éventuelle de l'obligation des promettants-vendeurs fut, en vertu de l'entente tripartite, assumée par le Trust Général du Canada qui, aux fins de cette exécution, devait agir aux lieu et place des promettants-vendeurs et à l'exclusion même d'une intervention unilatérale de leur part. Ceci était de l'essence même de l'entente. Bénéficiant de cette entente tripartite, Randall était libre, durant la période impartie pour ce faire, d'accepter la promesse de vente et ce, au moment même de son choix. Jusqu'à ce moment, il n'y avait encore aucun contrat de vente. Ce contrat ne pouvait se former en l'espèce que par le concours de volontés de Randall et du Trust Général du Canada agissant, comme ci-dessus indiqué, pour les promettants-vendeurs. La notion de concours de volontés implique qu'à un même moment donné, deux volontés coexistent. Planiol et Ripert, Droit Civil, 2e éd., tome VI, 241, au n° 126. Cette simultanéité de volontés ne s'est pas produite, car au moment où Randall signifiait son consentement au Trust Général du Canada par l'offre de paiement et la réquisition de livraison des actions, le Trust, en violation de son engagement, donna effet à l'intervention et à la révocation préalables de Beaudry et Butler. Sans doute, cette inexécution de leurs obligations par Beaudry, Butler et le Trust

[1] [1924] R.C.S. 120 à 132, 4 D.L.R. 716.

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Général du Canada constitue-t-elle une source de responsabilité pour les dommages en résultant pour Randall, mais il ne s'ensuit pas que, du fait de l'illégalité du retrait de la promesse de vente, le contrat de vente doive être considéré comme conclu. On trouve, sur le point, les commentaires suivants de Planiol et Ripert, *supra*, à la page 152, n° 132:

> Dès lors que l'offre comporte obligation de la maintenir pendant un temps, la révocation avant l'expiration de celui-ci est pour l'offrant une source de responsabilité, par le fait même de la révocation, sans que l'acceptant ait à établir une faute de l'offrant dans l'exercice de celle-ci, sauf à celui-ci à prouver l'absence de faute. Mais faut-il déclarer la révocation inefficace et considérer l'offre, qui devait être maintenue, comme l'ayant été en droit, et par suite considérer le contrat comme nécessairement conclu, par la jonction en temps utile de l'acceptation avec l'offre?
>
> Nous ne le croyons pas. Il manque l'accord de volontés qui est l'élément essentiel du contrat. Sans doute les conditions pratiques de sa conclusion, lorsqu'il a lieu entre absents, forcent à ne pas exiger strictement la coïncidence de cet accord au moment décisif de la formation du contrat. Mais la doctrine d'après laquelle le contrat serait formé malgré la révocation conduit à dire que le révoquant peut lui-même invoquer cette formation: ce qui, dans les contrats qui par leur seule formation transportent les risques d'une chose d'une partie à l'autre, lui permettrait malgré sa révocation, de mettre la perte de sa chose à la charge de l'acceptant. Cette conséquence est contraire à la bonne foi.
>
> Le contrat peut sans doute être déclaré conclu par le juge, mais seulement sur la demande de l'acceptant, et à titre de dommages et intérêts. L'auteur de l'offre sera condamné à passer le contrat, et faute de le faire à voir le jugement en tenir lieu.

La vente ne s'est donc pas formée et il n'y avait pas lieu, par conséquent, d'en demander la résolution.

Et alors que restait-il de cette entente tripartite, de cette option déjà périmée avant l'instruction de l'action, ou de la possibilité, même avant sa péremption, de l'exécuter suivant sa teneur véritable par suite de la révocation préalable à l'acceptation de Randall et à laquelle le Trust Général du Canada donna effet? Les actions d'Aconic Mining Corporation étaient, ainsi qu'il appert au dossier, hautement spéculatives. Le temps était de l'essence de cette entente tripartite et il appartenait exclusivement à Randall de choisir le moment de la levée de l'option. Dès le retrait illégal de cette promesse de vente, Randall pouvait par action en justice opter pour la possession de ces actions ou une somme d'argent à titre de dommages-intérêts. L'action qu'il a prise implique nécessairement qu'il a abandonné la première alternative—offrant une compensation de mesure

aléatoire—pour opter pour la seconde. En toute déférence pour les Juges dissidents et d'accord avec les Juges de la majorité en Cour d'Appel, je dirais que, dans les circonstances, l'action en dommages-intérêts était bien fondée.

Il en résulte que les trois jugements de la Cour d'Appel doivent être maintenus et que les quatre appels devant cette Cour doivent être renvoyés, avec dépens dans chacun des cas.

Appels rejetés avec dépens.

Procureur du défendeur Beaudry: Edouard Masson, Montréal.

Procureurs de la défenderesse Trust Général du Canada: Laurendeau & Laurendeau, Montréal.

Procureurs du demandeur Randall: Hyde & Ahern, Montréal.

1963
*Mar. 15
Mar. 22

FREGO CONSTRUCTION INCORPORATED (*Defendant*) ..... APPELLANT;

AND

MARY LEE CANDIES LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Real property—Lease of store—Prohibition to lease another store to company in same business in same shopping centre—Whether prohibition violated.

The defendant leased to the plaintiff a store in a new shopping centre. It was clearly stipulated in the lease and agreed that there would not be another store in the centre whose business would be devoted primarily towards the sale of candies and nuts. Some time later another store was leased to a company which was in that business. The plaintiff asked for the annulment of the lease on the ground that it had been violated. The trial judge dismissed the action but the Court of Appeal, in a majority judgment, annulled the lease. The defendant appealed to this Court.

Held: The appeal should be allowed.

The prohibition to lease premises to another store in the same business applied only to that portion of the land described in the agreement

*PRESENT: Tachereau, Fauteux, Abbott, Martland and Judson JJ.

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as the "centre", and, as found by the trial judge and the two dissetting judges in the Court of Appeal, the new store leased was outside the boundaries of the centre as contemplated by the parties.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Charbonneau J. Appeal allowed.

C. A. Geoffrion, Q.C., and *M. B. Spiegel*, for the defendant, appellant.

J. F. Chisholm, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—On the 5th of November 1959, the appellant Frego Construction Inc. leased to respondent Mary Lee Candies Limited a store situated on Lafleur Avenue in the City of Lasalle, described in the lease as follows:

> Those certain premises presently being built by the Lessor on Lafleur Avenue, in the City of Lasalle, Province of Quebec, and forming part of a *proposed shopping centre* to be built by the said Lessor, *between the existing building containing the Royal Bank at the corner of Jean Milot Street and Lafleur Avenue, and the existing Steinberg's Supermarket;*
>
> The *said shopping centre being* erected on land more fully designated as follows:—
>
> that certain block of land in the City of Lasalle, Province of Quebec, situated on the northwest side of Lafleur Avenue, being of irregular shape and composed of the whole of Lots. Nos. 958-19-1-1, 958-19-2, 958-19-3, 958-20-1, 958-20-2 and 958-20-3-1 and part of Lot No. 958-19-1-3 of the Official Cadastre of the Parish of Lachine, Registration Division of Montreal, which said block of land measures two hundred and eight and thirty-eight hundredths (280.38') feet in its southeast line along Lafleur Avenue, two hundred and five (205) feet in its Southeast line and two hundred (200) feet in its northeast line, all measurements being English measure and more or less;
>
> *The said shopping centre being built by the Lessor shall be referred to hereinafter as 'The Centre';*
>
> The premises being built as part of *the Centre,* which is being leased by these presents to the Lessee herein, shall measure ten feet (10') in frontage center to center of walls along Lafleur Avenue, by a depth of sixty feet (60') more or less; i.e. center lines of partitioning walls. (S.M.W.M.F.).

It is clearly stipulated in the lease and agreed that there will not be another store in the *Centre* whose business would be devoted primarily towards the sale of candies and nuts. The *Centre* was built between The Royal Bank, at the

[1] [1963] Que. Q.B. 37.

corner of Jean Milot Street and Lafleur Avenue, and the existing Steinberg's Supermarket. Some time later, another store was leased to Laura Secord which company was in the same business. The claim of the respondent is that this had constituted a violation of the agreement and asked that the lease entered into be declared annulled and cancelled for all future purposes. Mr. Justice Charbonneau of the Superior Court dismissed the action, but the Court of Appeal[1], Hyde and Owen JJ. dissenting, came to the conclusion that the trial judge's judgment should be reversed, and annulled the lease entered into between the appellant and the respondent.

I have reached the conclusion that the prohibition to lease premises to another store selling candies and nuts, applies only to that portion of the land described in the agreement as the "Centre".

I fully agree with the finding of the trial judge, concurred in by Hyde and Owen JJ., that the new store leased to Laura Secord was outside the boundaries of the "Centre" as contemplated by the parties.

I would allow the appeal and dismiss the action with costs throughout.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Spiegel, Shriar & Polak, Montreal.

Solicitor for the plaintiff, respondent: T. Konbrat, Montreal.

[1] [1963] Que. Q.B. 37.

1963
*Feb. 18
Mar. 27

OSLER, HAMMOND & NANTON LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Profit on sale of shares retained in investment account—Underwriter—Whether capital gain or income—Admissibility of evidence of subsequent transactions—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant carried on the business, *inter alia*, of an investment dealer. In 1954, it underwrote an issue of preferred and common shares of a company and retained 22,000 of the common shares in an "investment account". In 1956, the appellant received the right to acquire one new common share for each four it held. It thus received 5,500 shares which were immediately sold at a profit of $19,250. In 1957, the appellant sold 2,000 of its 22,000 shares at a profit of $57,032.88. The appellant contended that both profits were capital gains, but the Minister assessed them as income derived from business. The assessment was affirmed by the Exchequer Court. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

The shares were not purchased as an investment, they formed part and were received by the appellant as part of an underwriting transaction. They were sold in the course of the appellant's business of underwriting, and any profits arising from their disposition were profits from the appellant's business. It made no difference that they were retained in what the appellant chose to call an "investment account". This retention was inseparably connected with the underwriting activity, and the profits derived from this activity, whether immediate or deferred, were subject to income tax.

The trial judge erred in rejecting a tender of evidence by the Minister concerning the appellant's financial statements for 1958, 1959 and 1960 and purchases and sales of other securities recorded in the investment account. This was relevant to show a course of conduct and to show that at all times the shares in question were part of the appellant's stock-in-trade.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], affirming the appellant's assessment for income tax.

Alan Sweatmen, Q.C., for the appellant.

G. F. Henderson, Q.C., and *J. A. Irving*, for the respondent.

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Judson JJ.

[1] [1961] C.T.C. 462, 61 D.T.C. 1291.

The judgment of the Court was delivered by

JUDSON J.:—The appellant company, among other activities, carries on the business of an investment dealer. In 1954 it agreed to purchase from Trans-Prairie Pipelines Limited a new issue of preference and common shares. It purchased 140,000 preference shares for $700,000, less a commission of $37,500, and 190,000 common shares for $140,000. We are concerned in this appeal with the common shares. The company sold 140,000 of these for $140,000, leaving it with a balance of 50,000 shares. 28,000 of these were used as a bonus on the sale of the preference shares at the rate of one common share for each five preference shares, leaving the appellant with 22,000 common shares which it retained in its investment account.

In 1956, Trans-Prairie Pipelines Limited gave its common shareholders the right to purchase one new common share for each four held. The appellant thus became entitled to 5,500 shares, which it immediately sold at a profit of $19,250. Counsel admits that this profit is taxable if the next mentioned profit in the year 1957 is taxable.

In 1957, the appellant sold 2,000 shares out of the block of 22,000 common shares which it had retained in its investment account since the 1954 underwriting. On this sale it realized a profit of $57,032.88. Both the profits on the sale of the rights in 1956 and on the sale of the 2,000 shares in 1957 were assessed for income tax as income derived from the appellant's business. The appellant argues that they were capital gains. The judgment of the Exchequer Court[1] was that they were income subject to taxation.

Much evidence was heard on the reasons why the appellant retained the block of 22,000 common shares but it is all adequately summarized in the reasons of the learned President of the Exchequer Court when he said that the appellant thought that it was a good investment and hoped that its retention would lead to further business from the issuing company. The ratio of the decision in the Exchequer Court which I wish to affirm is that the appellant did not purchase these shares as an investment. They formed part of and were received by the appellant as part of an

[1] [1961] C.T.C. 462, 61 D.T.C. 1291.

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OSLER, HAMMOND & NANTON LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

underwriting transaction. They were acquired and, to the extent of 2,000 shares, were sold in the course of the appellant's business of underwriting, and any profits arising from their disposition were profits from the appellant's business. The fact that they were retained in what the appellant chose to call an "investment account" made no difference. This retention was inseparably connected with the appellant's underwriting activity and the profits derived from this activity, whether immediate or deferred, were subject to income tax.

I attach no importance to the fact that on the figures that I have quoted above, these 22,000 shares may be regarded as the appellant's commission for the underwriting of the common shares. Even if this had not been so, it would still be a case where the shares had been acquired and sold and the profits made in the course of the appellant's business.

Counsel for the Minister on this appeal argued that there was error in a ruling on evidence made at the trial. The learned trial judge, against counsel's objection, rejected a tender of evidence and cross-examination on the following matters:

(a) the financial statements of the appellant for its 1958, 1959 and 1960 taxation years;
(b) purchases and sales of securities recorded in the investment account in the years subsequent to the years under appeal;
(c) purchases and sales of securities recorded in the investment account in the 1956 and 1957 taxation years in the cases where the appellant at the end of the 1957 taxation year still held some of these securities.

In my opinion, there was error in the rejection of this evidence. It was relevant to show a course of conduct in trading in securities recorded in the investment account, and to show that at all times the shares of Trans-Prairie Pipelines Limited sold in 1956 were part of the appellant's stock-in-trade and that the profit from the sale of these shares arose from the business carried on by the appellant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Pitblado, Hoskin & Company, Winnipeg.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

JOSEPH SAINE ..... APPELLANT;

1963

*Mar. 19
June 24

AND

ARMAND BEAUCHESNE AND L. J. GOBEIL ..... RESPONDENTS;

AND

THE COLLEGE OF PHYSICIANS AND SURGEONS OF THE PROVINCE OF QUEBEC AND GERALD LASALLE ..... MIS-EN-CAUSE.

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC

Physicians and Surgeons—Acts derogatory to medical profession—Writ of certiorari while proceedings before Council on Discipline—Whether premature—The Quebec Medical Act, R.S.Q. 1941, c. 264, ss. 62, 71, 74—Code of Civil Procedure, art. 1292.

The appellant, a member of the College of Physicians and Surgeons, was summoned before the Council on Discipline to answer a complaint alleging that he had committed acts derogatory to the honour and dignity of his profession. During their course of the hearing, the appellant's request for a suspension of the proceedings in order to apply for a writ of certiorari, was granted. The Superior Court judge held that the writ was premature. The appellant was granted leave to appeal to this Court from that judgment.

Held: The appeal should be dismissed.

The sole question was whether the provisions of the *Quebec Medical Act*, R.S.Q. 1941, c. 264, as amended, deprived the appellant of any remedy by way of certiorari while proceedings were pending before the Council on Discipline. To acceed the appellant's contention would render otiose the words contained in s. 62 of the Act "and to the exclusion of any Court". In that section the Legislature has provided in clear terms that the Council on Discipline has jurisdiction to proceed with and complete, without judicial interference, an inquiry into the matters therein specified. The application for a writ of certiorari was, therefore, premature.

APPEAL by leave from a judgment of Montpetit J. of the Superior Court of Quebec dismissing an application for a writ of certiorari. Appeal dismissed.

Guy Favreau, Q.C., for the appellant.

L. C. Trudel and *Georges Pelletier, Q.C.*, for the respondent.

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Hall JJ.

1963

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The judgment of the Court was delivered by

ABBOTT J.:—Appellant is a member of the College of Physicians and Surgeons of the Province of Quebec. On August 24, 1961, he was summoned to appear before the Council on Discipline of the said College to answer a complaint made by the Registrar, alleging that appellant had committed certain acts derogatory to the honour and dignity of his profession. On the date fixed for the hearing, September 14, 1961, appellant appeared, assisted by counsel, before the respondents Gobeil and Beauchesne sitting as members of the said Council.

At the outset of the hearing, appellant through his counsel raised certain legal objections to the complaint which were rejected by the Council. The hearing proceeded. During the course of the hearing, appellant asked that the proceedings be suspended in order that he might apply for a writ of certiorari to evoke the proceedings to the Superior Court. The hearing was suspended and on September 28, 1961, appellant, by petition, applied to the Superior Court for the issue of a writ of certiorari, alleging among other things that the respondents were acting without jurisdiction or had exceeded their jurisdiction, that the by-laws in virtue of which the complaint had been made were null and void, and that the proceedings contained grave irregularities.

By judgment rendered October 23, 1961, Mr. Justice André Montpetit dismissed the application for a writ of certiorari as being premature. The present appeal by leave, is from that judgment.

The sole question which arises on this appeal is one of law, namely whether the provisions of the *Quebec Medical Act*, R.S.Q. 1941, c. 264, as amended, deprived appellant of any remedy by way of certiorari while proceedings were pending before the said Council on Discipline. This question turns, primarily, upon the effect to be given to ss. 62, 71 and 74 of the said Act which read:

62. It shall be the duty of the Council on Discipline to inquire into, to consider, hear and decide finally and to the exclusion of any court, subject to appeal to the Provincial Medical Board, every charge or complaint against any member of the College, for infraction of his professional duties or for any act derogatory to the honor and dignity of the profession.

71. The disciplinary penalties which may be imposed by the Provincial Medical Board or by the Council shall be:

1. Deprivation, for a certain time, of the right to vote at elections of governors and at all general meetings of the members of the College;

2. Deprivation of the right to be elected to the office of governor;

3. Deprivation of the right of a member of the Provincial Medical Board to sit at one or more sittings;

4. Censure;

5. Dismissal from the Provincial Medical Board;

6. Suspension from the practice of the profession of medicine and surgery, which entails during suspension the dismissal of such member from the College;

7. Dismissal from the College.

74. 1. Every decision of the Council on Discipline entailing suspension or dismissal, shall be subject to appeal to the Provincial Medical Board. Notice of such appeal shall be served by a bailiff upon the registrar who has reported the decision to the member of the College who has been suspended or dismissed, within fifteen days following the date of the service. Such appeal shall be taken into consideration only at a regular session of the Provincial Medical Board.

2. No member of the Council may sit in appeal from a judgment rendered by the Council of which he is a member.

3. Articles 237 and 238 of the Code of Civil Procedure shall apply to the members of the Provincial Medical Board sitting in appeal.

4. The quorum of the members of the Provincial Medical Board sitting in appeal shall be eight members.

5. The appellant shall deposit with his notice of appeal the sum of fifty dollars on account of the costs occasioned by such appeal.

If he succeeds in such appeal the said sum shall be returned to him. The losing party shall be condemned to pay it to the Provincial Medical Board with the other costs occasioned by such appeal.

6. The Provincial Medical Board shall decide the appeal summarily, and the registrar shall within eight days forward a certified copy of such decision to the appellant, by registered letter.

7. The only mode of evoking the case before judgment or of having the judgment rendered revised is by means of a writ of certiorari.

In essence appellant's contention is that notwithstanding the provisions of s. 62 of the Act, the remedy of certiorari is available to him under art. 1292 of the *Code of Civil Procedure* while proceedings are pending before the Council on Discipline and that s. 74(7) applies to such proceedings, as well as to those before the Provincial Medical Board.

I am unable to agree with that contention. To do so it seems to me, would render otiose the words "and to the exclusion of any court" contained in s. 62. In my opinion, in that section the Legislature has provided in clear terms that the Council on Discipline has jurisdiction to proceed with and complete, without judicial interference, an inquiry

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into the matters therein specified. It is not necessary to express any opinion as to what the situation might be after the Council has completed its inquiry and rendered a decision but before an appeal, if any, is taken to the Provincial Medical Board, and I therefore refrain from doing so.

Subsection 7 of s. 74 must be read in the context in which it is found. It is contained in a section which deals exclusively with appeals to the Provincial Medical Board, from decisions of the Council on discipline which entail suspension or dismissal. The language of the subsection is clear and unambiguous and in my opinion it relates exclusively to proceedings before the Provincial Medical Board either before or after judgment.

I am in respectful agreement with the learned trial judge that the application for a writ of certiorari while proceedings were pending before the Council on Discipline was premature, and I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the appellant: Roger Beaulieu and Guy Favreau, Montreal.

Attorneys for the respondents and mis-en-cause: Louis-Claude Trudel, Montreal.

1963

*May 8, 9
May 9

THE CITY OF KELOWNA .....APPELLANT;

AND

THE PUBLIC UTILITIES COMMISSION AND THOMAS JOSEPH FAHLMAN ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Municipal corporations—Water service outside city limits—Whether municipality acquired status of a public utility—Public Utilities Act, R.S.B.C. 1960, c. 323.

By a decision of the Public Utilities Commission, the city was required to provide water service to the property of the respondent which

*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

was outside the city limits. An appeal to the Court of Appeal was dismissed. The city appealed to this Court against the ruling of the Court of Appeal that once a municipal corporation undertook the supply of water services to any property situate beyond its boundaries it became a public utility.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a decision of the Public Utilities Commission.

A. D. McEachern and *B. C. Weddell,* for the appellant.

G. W. Burke-Robertson, Q.C., for the respondent Public Utilities Commission.

P. D. O'Neil, for the respondent Fahlman.

At the conclusion of the argument of Counsel for the appellant, the following judgment was delivered orally.

THE COURT:—Mr. McEachern has said all that could be said in support of this appeal but we are all of opinion that the appeal fails.

We were invited to over-rule the judgment of the Court of Appeal for British Columbia in *City of Vernon v. Public Utilities Commission*[2], but we agree with the interpretation of the phrase "public utility", as defined in s. 2 of the *Public Utilities Act,* in the reasons of the majority of the Court in that case and in the reasons of the Court of Appeal in the case at bar.

The appeal will therefore be dismissed. Both of the respondents are entitled to their costs in this Court.

Appeal dismissed with costs.

Solicitors for the appellant: Weddell, Horn & Lander, Kelowna.

Solicitors for the respondent Public Utilities Commission: Ellis, Dryer & McTaggart, Vancouver.

Solicitor for the respondent Fahlman: P. D. O'Neil, Kelowna.

[1](1962), 40 W.W.R. 547. [2](1953), 9 W.W.R. (N.S.) 63.

1962
*Nov. 5
1963
Avr. 1

SA MAJESTÉ LA REINE .....APPELANTE;

ET

NORMAND DESPRÉS .....INTIMÉ.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Droit criminel—Acceptation d'argent en vue d'exercer une influence auprès d'un fonctionnaire—Obtention d'un permis de bière—Employés de la Commission des Liqueurs sont-ils des officiers publics—Statut de la Commission—Code Criminel, arts. 99(d)(e), 102.

L'intimé a été accusé et trouvé coupable d'avoir accepté de l'argent en considération d'un exercice d'influence concernant l'obtention auprès de la Commission des Liqueurs d'un permis pour la vente de bière, contrairement à l'art. 102(2) du *Code criminel*. Devant la Cour d'Appel, l'intimé a soutenu que la Commission était indépendante du Gouvernement et par conséquent ne tombait pas sous la définition de gouvernement de l'art. 102. La Cour d'Appel a acquitté l'intimé, et la Couronne appelle devant cette Cour.

Arrêt: L'appel de la Couronne doit être maintenu.

La preuve révèle que l'intimé a véritablement prétendu avoir de l'influence auprès du gouvernement ou d'un ministre ou d'un fonctionnaire. En prétendant exercer de l'influence auprès de la Commission des Liqueurs, l'intimé a violé les dispositions du *Code criminel*. Il est vrai que la Commission est une corporation, mais ses activités ne sont qu'un prolongement des activités gouvernementales. Les employés de la Commission sont des «officiers publics». Conséquemment, par l'effet combiné des arts. 99 et 102 du Code, toute personne qui prétend exercer de l'influence auprès de ces employés, moyennant rémunération en considération de l'obtention d'un avantage ou bénéfice, est coupable d'une offense criminelle.

APPEL de la Couronne d'un jugement de la Cour du banc de la reine, province de Québec[1], acquittant l'intimé. Appel maintenu.

Jacques Bellemare, pour l'appelante.

Marcel Bourget, pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE TASCHEREAU:—Le 22 septembre 1961, l'intimé-accusé, Normand Després, était trouvé coupable par M. le Juge Armand Cloutier, de la Cour des sessions de la paix,

*CORAM: Les juges Taschereau, Fauteux, Abbott, Martland et Ritchie.

[1] [1962] B.R. 567, 38 C.R. 337.

pour le district judiciaire de Montréal, sur l'accusation suivante, à savoir:

NORMAND DESPRÉS, à Ville St-Michel, district de Montréal, le ou vers le 3 octobre 1960, ayant et prétendant avoir de l'influence auprès du gouvernement de la province de Québec et des fonctionnaires dudit gouvernement, d'avoir illégalement accepté pour lui-même et d'autres personnes une récompense de mille dollars ($1,000.00) en considération d'une collaboration, d'une aide, d'un exercice d'influence concernant la conclusion d'affaires avec le gouvernement et un sujet d'affaires ayant trait audit gouvernement, savoir: l'obtention auprès de la Commission des Liqueurs de Québec du permis n° 3103-60 pour la vente de bière dans l'épicerie dudit Antoine Théoret, au n° 2614, Place Bon-Air, Ville St-Michel, district de Montréal, commettant par là un acte criminel, contrairement à l'article n° 102, par d, sous-par I, du code criminel.

L'accusé a été condamné par le juge au procès à un mois de prison. Devant la Cour d'Appel[1] il a prétendu, en premier lieu, que la Commission des Liqueurs de Québec était indépendante du Gouvernement de la Province, et qu'en conséquence, il ne pouvait être trouvé coupable en vertu du *Code Criminel*, art. 102, para. (*d*), sous-para. (1). L'intimé a également demandé à la Cour d'Appel de réduire la sentence qui a été prononcée contre lui. Les honorables Juges Bissonnette et Taschereau ont conclu que le jugement de M. le Juge Armand Cloutier était erroné, mais M. le Juge Owen a enregistré sa dissidence, et ce dernier aurait confirmé le jugement de culpabilité. Quant à l'appel de la sentence, où cette Cour n'a pas juridiction, M. le Juge Owen l'aurait rejeté étant d'opinion qu'elle était raisonnable, mais MM. les Juges Bissonnette et Taschereau n'ont pas cru devoir se prononcer sur ce point, vu l'opinion qu'ils ont émise sur le jugement de culpabilité. Ils ont conclu, à cause de l'acquittement, que cet appel devait être tenu pour non avenu et qu'il devait être rejeté.

La preuve révèle que l'accusé-intimé a reçu $1,000 d'Antoine Théoret afin de lui obtenir une licence pour la vente de la bière, de la Régie des Alcools de la Province de Québec. Peu après avoir reçu les $1,000 l'appelant a fait une confession à la Sûreté provinciale de Québec, et après avoir été mis en garde, voici ce qu'il a dit:

La sûreté provinciale du Québec—Mise en garde à une personne détenue comme témoin. Nous devons vous dire que nous sommes des officiers de police et que vous êtes maintenant détenu comme témoin important concernant la cause de: perception de $1,000.

[1] [1962] B.R. 567, 38 C.R. 337.

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Désirez-vous dire quelque chose en rapport avec cette cause? Vous êtes entièrement libre, vous n'êtes obligé de rien dire, à moins que vous désiriez le faire, mais tout ce que vous direz sera pris par écrit et pourra servir de preuve devant le tribunal.

LE TÉMOIN DIT: Je NORMAND DESPRÉS, 39 ans, fils de Félix, numéro 7270, rue 7ème avenue, V. St-Michel, déclare solennellement que: Je suis prêt à vous raconter pourquoi j'ai reçu $1,000 dollars de M. Antoine Théoret et aussi je vais vous dire à qui devait aller cet argent.

Q. Avez-vous bien compris la mise en garde?

R. Oui.

Q. Depuis combien de temps connaissez-vous M. Antoine Théoret?

R. Je le connais depuis environ 4 ans, car je suis un de ses clients, à sa grocerie à Ville St-Michel, de plus, j'ai eu l'occasion de le mieux connaître, car un peu après les élections de l'été 1960, il est venu me voir pour obtenir une licence de bière pour sa grocerie, je suis allé avec lui rencontrer le secrétaire du député Jean Meunier, c'est-à-dire M. Raoul Laforte, j'ai recommandé M. Théoret pour avoir la dite licence. Je dois vous dire qu'auparavant M. Théoret m'avait dit qu'il me récompenserait, il m'a demandé combien cela lui coûterait et je lui ai dit que d'habitude, pour avoir une licence de bière, ça coûtait $1,000, il a fait un signe affirmatif. Par la suite au mois de septembre, j'ai eu des entrevues avec lui, je lui ai dit que des inspecteurs iraient chez lui pour inspection, peut-être. Le 28 septembre 1960, M. Théoret m'a informé qu'il avait reçu un téléphone du département des permis et je lui ai dit d'y aller. Le lendemain soir, à 6.00 p.m., M. Théoret est venu chez moi à 7270, 7ème avenue, il m'a dit qu'il n'avait pas d'argent et il m'a dit qu'il viendrait au commencement de la semaine prochaine pour régler ça. Je lui ai dit que j'avais quelqu'un à rencontrer en la personne d'un monsieur que je ne lui ai pas nommé.

Q. Voulez-vous nous dire à qui devait aller l'argent que nous avons saisi chez-vous?

R. Une somme de $200 devait me revenir et la balance devait aller à un nommé Bélanger dont j'ai le numéro de téléphone chez moi, celui-ci m'a dit par téléphone que le restant était pour la caisse du comté.

signé: NORMAND DESPRÉS
témoin: Paul-E. LAPIERRE, agent P.J.

Déclaration faite à Montréal,
ce 3e jour d'octobre 1960, à 7.45 p.m.
Témoin: Lucien Dubuc, Agent P.J.

Théoret, au nom de qui le permis pour la vente de la bière a été émis, corrobore cette déclaration de l'intimé.

Je n'entretiens pas de doute, comme d'ailleurs M. le Juge Owen l'a dit dans son jugement, que l'intimé a véritablement prétendu avoir de l'influence auprès «du gouvernement ou d'un ministre du gouvernement», ou d'un «*fonctionnaire*». Le texte anglais emploie le mot «official» pour traduire le mot «fonctionnaire».

Or, l'article 99 (*d*) et (*e*) définit ces mots. Cet article se lit ainsi:

> 99. d) «charge» ou «emploi» comprend
> (i) une charge ou fonction sous l'autorité du gouvernement;
> (ii) une commission civile ou militaire; et
> (iii) un poste ou emploi dans un département public;
> e) «fonctionnaire» désigne une personne qui
> (i) détient une charge ou un emploi, ou
> (ii) est nommée pour remplir une fonction publique;

Je suis d'opinion que l'accusé-intimé, en prétendant exercer de l'influence auprès de la Commission des Liqueurs ou de ses fonctionnaires, a violé les dispositions ci-dessus du *Code Criminel*. Les fonctionnaires de la Commission des Liqueurs sont nommés pour remplir une fonction publique. La Commission a été créée par une loi de la Législature. Ses officiers dirigeants sont nommés par le Gouvernement de la province, et tous les profits qui sont réalisés par la vente des alcools sont versés dans le fonds consolidé. Il est vrai que la Commission est une corporation, mais ses activités ne sont qu'un prolongement des activités gouvernementales. Ce serait une erreur de penser qu'il existe au point de vue légal une cloison étanche entre le Gouvernement et la Commission. Cette dernière, évidemment, a plus de liberté d'action et d'indépendance qu'un autre département gouvernemental. Elle est une émanation de la Couronne, et toute personne qui y occupe un poste, tient un emploi dans un *département public,* au sens de l'article 99 (*d*) du *Code Criminel.*

Le statut de la Commission des Liqueurs de Québec a été examiné déjà par notre Cour dans la cause de *La Commission des Liqueurs de Québec v. Moore*[1], alors que Sir Lyman Duff s'est ainsi exprimé:

> That the Commission is an instrumentality of government is clear from the circumstances that the members of the Commission are appointed by the Governor in Council and are removable at pleasure (s. 6); that all property in the possession of or under the control of the Commission is expressly declared to be the property of the Crown; and that all moneys received by the Commission at the discretion of the Provincial Treasurer are remissible to him, and, on receipt by him, become part of the consolidated funds of the province (s. 18); that the Commission is accountable to the Treasurer in the manner and at the times indicated by the

[1] [1924] R.C.S. 540, 4 D.L.R. 901.

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latter (s. 19). The Commission, moreover, exercises authority respecting the sale of liquor in the province, and infractions of the law dealing with that subject are prosecuted in the name of the Commission or of the municipality where the infraction occured. By s. 13, the employees of the Commission are declared to be public officers, and they are required to take the oath of public service as such.

De plus, dans *Regina v. Gibson*[1], la Cour Suprême de la Nouvelle-Écosse, après avoir considéré les structures, les fins, l'objet et les pouvoirs de la Commission des Liqueurs de cette province, en est venue à la conclusion suivante:

> Applying that test to the present case, *it is clear that the Commission is only a manager for carrying on as an agent or servant of the Government of the Province what has been made by the Act, the business of the Government,* or, in other words, the Commission is merely an administrative body appointed by the Government with certain duties and powers entrusted to it for carrying out the administration of the Act, through the instrumentality of which the Government exercises government control over transactions in liquor within the Province.

Je dois donc nécessairement conclure que les employés de la Commission des Liqueurs sont des «officiers publics», et que par l'effet combiné des articles 102 et 99 du *Code Criminel,* toute personne qui prétend exercer de l'influence auprès d'eux, moyennant rémunération en considération de l'obtention d'un avantage ou bénéfice, est coupable d'une offense criminelle.

L'appel de la Couronne doit donc être maintenu, et le jugement de culpabilité prononcé par le juge au procès doit être rétabli. Mais comme l'accusé a appelé à la Cour d'Appel de la sentence prononcée et que, par suite de l'acquittement, la Cour n'a pas cru devoir se prononcer sur le mérite de ce dernier appel, le dossier est retourné à la Cour inférieure pour adjudication définitive, si celle-ci le juge à propos.

Appel maintenu.

Procureur de l'appelante: Claude Wagner, Montréal.

Procureur de l'intimé: Raymond Daoust, Montréal.

[1] (1954), 20 C.R. 330, 35 M.P.R. 265, 111 C.C.C. 72.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

HARTLEY BEAMAN .....RESPONDENT.

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*Feb. 28
*Mar. 1
Apr. 1

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Arrest—Escaping from lawful custody—Assistant forest ranger making search of vehicle under Game Act—Whether a "peace officer"—Whether escape constitutes escape from lawful custody—The Game Act, R.S.N.B. 1952, c. 95—The Forest Service Act, R.S.N.B. 1952, c. 93, s. 7, as amended by 1960 (N.B.), c. 34—Criminal Code, ss. 2(30)(c), 29(2)(b), 110(a), 125(a), 434, 437.

The respondent was charged and convicted of escaping from custody contrary to s. 125(a) of the *Criminal Code*. An "assistant forest ranger" stopped a truck driven by the respondent and stated he was going to search it. While the ranger returned to his car to get an axe to pry open a door of the truck, the respondent commenced backing the truck. The officer followed in his car. When the truck stopped after about half a mile, the officer got out of his car, pulled out the truck's ignition key and told the respondent that he was under arrest. The officer had no warrant.

The conviction was set aside by the Court of Appeal on the ground that the Crown had failed to prove that the respondent was lawfully arrested under the *Game Act*, and consequently that it could not rely on the Act to support its contention that the respondent was in lawful custody at the time of his escape. The contention of the Crown, which appealed to this Court, was that the assistant forest ranger, being a deputy game warden under the *Game Act*, was a peace officer under the *Criminal Code*.

Held: The appeal of the Crown should be dismissed.

The *Game Act* gives every game warden, including a deputy as was ex-officio every assistant forest ranger, the powers of a constable and therefore of a peace officer within the meaning of the Code. It is true that these powers are limited to provincial laws and are conferred solely for the purpose of the *Game Act*, nevertheless any person who wilfully obstructs a game warden in the execution of his duties commits the indictable offence of wilfully obstructing a peace officer in the execution of his duties contrary to s. 110 of the *Criminal Code*.

However, in 1960, by an amendment to the *Forest Service Act*, the words "assistant forest ranger" were deleted and substituted by "district forest ranger" or "extension forest ranger". The information described the arresting officer as an assistant forest ranger, and the Crown's case was closed without any evidence to show that, in 1961 at the time of the arrest, the officer held any of the positions upon which the authority of a provincial constable or a game warden was conferred by the statute then in force. Accordingly, the record failed to disclose that the officer was a peace officer or that he had any authority to stop a vehicle for search, or that the respondent in acting as he did committed any offence for which he could be lawfully

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

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arrested without a warrant. The respondent was therefore not proved guilty of escaping from lawful custody.

APPEAL by the Crown from a judgment of the Supreme Court of New Brunswick, Appeal Division, setting aside the respondent's conviction. Appeal dismissed.

L. D. D'Arcy, for the appellant.

Douglas E. Rice, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal, brought with leave of this Court, from a judgment of the Appeal Division of the Supreme Court of New Brunswick setting aside the conviction of the respondent by the Magistrate for Albert County on the charge that, on the 1st day of December 1961, he did,

being in lawful custody, having been arrested without a warrant by Assistant Forest Ranger Austin Goggin, escape from such custody contrary to s. 125(a) of the Criminal Code.

The Appeal Division found that Austin Goggin was an "assistant forest ranger" and that the respondent had escaped from his custody, so that the only question remaining to be determined was "whether the evidence established a lawful arrest". The circumstances of the arrest are described in the decision appealed from in the following terms:

The facts are Austin Goggin, accompanied by one Babin, another Assistant Forest Ranger, while on game patrol during the evening of December 1, 1961, was driving his car on a highway in the Flint Hill area of the Parish of Elgin in the County of Albert. At about 8.00 p.m., Goggin and Babin got out of the car and stopped a half-ton truck approaching them which was being driven by the defendant who had seated beside him Mrs. Marjorie Robb and her husband Irvine Robb, the owner of the truck, Mrs. Robb being in the centre.

After stopping the truck, Goggin and Babin told the occupants they were going to search it. Goggin then went to his car to get an axe to pry open a plywood door on the truck. While he was doing this, the defendant commenced backing the truck. Goggin got in his car and followed. The evidence is that after the truck had backed up on the road about one-half of a mile it stopped and Goggin placed his car in such a position that the truck could not pass if it attempted to move forward. He then got out of his car, ran to the truck, and reaching in from the passenger side, turned off the ignition switch and pulled out the key. At the same time Goggin said to the occupants "You're under arrest." He had no warrant for the arrest of any of them.

Under the provisions of s. 19 of *The Game Act*, R.S.N.B. 1952, c. 95 (as amended), "every game warden" may, without warrant, stop and search any vehicle for evidence of a violation of the provisions of the Act, and s. 1(*u*) of the same Act provides that unless the context otherwise requires "game warden" includes an ex officio deputy game warden under *The Forest Service Act*.

On the assumption that "*the Forest Service Act* sets forth that every assistant forest ranger is ex officio a deputy game warden under *The Game Act*", Bridges J.A., who rendered the decision of the Appeal Division, concluded that there was "no question but that Goggin and Babin, as ex officio game wardens, had the authority to stop and search the truck . . .", but he went on to hold that "the Crown failed to prove that the defendant was lawfully arrested without a warrant under *The Game Act* and cannot rely on such Act to support its contention that he was in lawful custody at the time of his escape".

It was, however, contended by the Crown that in backing up the truck after having been told of the proposed search, the respondent was wilfully obstructing "a peace officer in the execution of his duty", contrary to s. 110(*a*) of the *Criminal Code*, and was therefore committing an indictable offence and subject to lawful arrest without a warrant by "any one" who found him committing it (s. 437 of the *Criminal Code*).

Bridges J.A. found that by backing the truck as he did the respondent wilfully obstructed Goggin and Babin in the execution of their duty, but that, although he considered them to be "game wardens" under *The Game Act*, they were not "peace officers" within the meaning of s. 110(*a*) of the *Criminal Code*, and that accordingly no offence had been committed for which the respondent could have been lawfully arrested without a warrant.

The application pursuant to which leave to appeal was granted to this Court is limited to this latter finding as it is based upon the following grounds:

1. The Court having found that the deputy game warden was wilfully obstructed in the execution of his duty was in error in holding that the said deputy game warden was not a peace officer under s. 2(30)(c) of the Criminal Code.

2. That there is conflict in the judgment of the Supreme Court of New Brunswick, Appeal Division, in the above noted case and the

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judgment of the Ontario Court of Appeal in *Rex v. Smith*, 1942, 3 D.L.R. 764.

Section 2(30)(*c*) of the *Criminal Code* provides that:

> A peace officer includes a police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process.

The general powers and authority of a "game warden" are described in s. 18 of *The Game Act*, which reads as follows:

> 18. Every warden may and shall for the purpose of this Act, exercise all the powers and authorities of a provincial constable and shall have the same power to ask and require assistance in the performance and execution of his duties as a peace officer or constable in the execution of his duty as such, and every warden shall be ex officio a peace officer within the meaning of any law for the protection of peace officers.

The decision of the Appeal Division that such a warden is not a "peace officer" as defined by s. 2(30)(*c*) was expressed by Bridges J.A. in one part of his decision in the following language:

> This section (i.e., s. 18 of the Game Act) does not make a warden a provincial constable, who comes within the definition of peace officer under the Code. It only purports to give a warden the powers of such a constable when enforcing the Game Act. These powers must, in my opinion, be limited to provincial laws and cannot include the right to arrest for criminal offences without warrant for, although the Province may appoint constables and other law enforcement officers it cannot give them the authority to act in criminal matters, such field of legislation belonging wholly to the Federal Parliament.

With the greatest respect, it appears to me that this passage is not altogether clear. In my view, the provisions of s. 18 of *The Game Act* not only purport to give but do give to every "game warden" the powers of a "constable" and therefore of a "peace officer" within the meaning of ss. 2(30)(*c*) and 110 of the *Criminal Code*. I agree that these powers are limited to provincial laws and are conferred solely for the purpose of *The Game Act* but this does not alter the fact that any person who wilfully obstructs a "game warden" in the execution of his duties under that Act is committing the indictable offence of wilfully obstructing a "peace officer in the execution of his duties", contrary to s. 110 of the *Criminal Code*.

As has been observed, it is provided by s. 434 of the *Criminal Code* that "*any one* may arrest without warrant a

person whom he finds committing an indictable offence" (the italics are mine), and it is accordingly apparent that the right to arrest without a warrant under these circumstances is not conferred by any provincial law or accorded to a "game warden" by virtue of *The Game Act* but is a right which stems directly from the *Criminal Code* and is, by that statute, conferred on every citizen.

The situation appears to me to be that although the sphere of a game warden's authority is limited to the enforcement of a provincial statute, he is, nevertheless, for that purpose and by that statute, clothed with all the rights, powers and protections afforded to a peace officer by the *Criminal Code*. With all respect, this does not in my view mean that the province is giving to one of its law enforcement officers "the authority to act in criminal matters" and I cannot see that this legislation gives rise to any problem or conflict between the provincial and federal fields.

This appears to me to dispose of the question on which the application for leave to appeal is based but it does not determine the matter.

The case for the Crown, and much of the decision of the Court of Appeal, is predicated upon the assumption, stated by Bridges J.A., that:

> The Forest Service Act sets forth that every assistant forest ranger is ex officio a deputy game warden under The Game Act, and s. 1(u) of the latter states that in it, unless the context otherwise requires, "warden" or "game warden" includes an ex officio game warden under The Forest Service Act.

This was a true statement of the law until *The Forest Service Act* was amended by c. 34 of the Laws of New Brunswick 1960.

As enacted by R.S.N.B. 1952, c. 93, s. 7 of *The Forest Service Act* provided that:

> Every district forester, assistant forester, forest ranger and assistant forest ranger, has hereby conferred on him all the power and authority of a provincial constable and of a seizing officer under the Crown Lands Act, and he is also ex officio a deputy game warden under The Game Act and a fishery guardian under The Fisheries Act.

The 1960 amendment to *The Forest Service Act* provided for the employment of temporary officers and servants for the purpose of this Act, and it also amended s. 7 as follows:

> Section 7 of the said Act is amended by striking out the words "assistant forester, forest ranger and assistant forest ranger" in the first

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two lines thereof and substituting therefor the words "district forester, assistant district forester, inspector, district forester ranger, extension forest ranger and forest ranger".

Austin Goggin, who was the informant in this case, is described in the Information as an "assistant forest ranger", he testified that he was "an assistant forest ranger", and the Court of Appeal made an express finding that he was "an assistant forest ranger".

It is conceivable that the 1960 amendment merely evidenced a change in the title of "assistant forest ranger" to that of "district forest ranger" or "extension forest ranger" but the Crown's case was closed without any evidence being adduced to show that on December 1, 1961, the informant held any of the positions upon which the authority of a provincial constable or a game warden is conferred by the statute then in force, and the time for explanations is now long past.

Accordingly, the record before us fails to disclose that Austin Goggin was a "peace officer" or that he had any authority to stop a vehicle for search, or that the respondent in acting as he did was committing any offence for which he could be lawfully arrested without a warrant.

It is true that it has been held on more than one occasion that evidence of a person acting in an official capacity may, under certain circumstances, raise a rebuttable presumption of his due appointment to that office, but this is not a rule of universal application and certainly cannot apply so as to clothe Austin Goggin with the authority of a "warden" under *The Game Act,* since he has testified to the fact that he holds an appointment which does not carry that authority with it.

In view of the above, I do not find it necessary to consider the contention that the arrest was unlawful because the respondent was not given notice "of the reason for the arrest", as required by s. 29(2)(*b*) of the *Criminal Code.*

I would accordingly dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: L. D. D'Arcy, Fredericton.

Solicitor for the respondent: D. E. Rice, Petitcodiac.

JANOS JESO .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Jun. 20
Jun. 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—False representations—Whether any evidence—Question of law—Question of fact.

The appellant was charged and convicted on a charge that by deceit, falsehood or other fraudulent means he defrauded certain members of the public by inducing them to advance money to obtain the immigration to Canada of relatives or friends residing in Hungary. His appeal was dismissed by the Court of Appeal. He was granted leave to appeal to this Court on the question of law as to whether there was any evidence upon which the accused might properly be found guilty of the offences charged.

Held: The appeal should be dismissed.

There was evidence, most of which was circumstantial, on which it was open to the trial judge to find that the representations, which on the evidence were made by the appellant, were false and from which the inference of guilt could legally be drawn. The question as to whether guilt ought to have been inferred was one of fact with which this Court was not concerned.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the appellant's conviction. Appeal dismissed.

A. Maloney, Q.C., and *T. J. Donnelly*, for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, pronounced on February 14, 1962, dismissing, without recorded reasons, the appellant's appeal from his conviction before His Honour Judge Donley, on April 10, 1961, on the following charge:

> That in the years 1957, 1958, 1959 and 1960, at the Municipality of Metropolitan Toronto in the County of York by deceit, falsehood or other fraudulent means defrauded the public to wit; certain members of the public who were induced to advance money to obtain the immigration to Canada of relatives or friends who were residing in Hungary of a sum of money in excess of three thousand dollars contrary to the Criminal Code.

*PRESENT: Cartwright, Fauteux, Judson, Ritchie and Hall JJ.

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Cartwright J.

Leave to appeal was granted by this Court on the following question of law:

Whether there was any evidence upon which the accused might properly be found guilty of any of the offences charged in the indictment.

There was evidence on which it could be found that representations were made by the appellant to a number of persons and that they were induced by the representations to pay money to the appellant. The serious question, which was fully argued, was whether there was any evidence that the representations made were false. I have reached the conclusion that there was evidence, most of which was circumstantial, on which it was open to the learned trial judge to find that the representations were false and from which the inference of guilt of the appellant could legally be drawn. The question whether guilt ought to have been inferred was one of fact with which we are not concerned.

For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Arthur Maloney, Toronto.

Solicitor for the respondent: W. C. Bowman, Toronto.

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*Mar. 22
Jun. 24

HILL-CLARK-FRANCIS LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Lumber dealer—Option to buy shares of supplier with intent to make it a subsidiary—Exercise of option and resale of shares at profit—Whether income or capital gain—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant company carried on business as a general contractor and as a wholesaler and retailer in lumber. One of its major sources of supply of lumber had been for some years one P Co. In 1952, P Co. was in financial difficulties. The appellant, with the intention of making P Co. a subsidiary as it had done with two other companies in 1943 and 1944, and thus assuring itself of not losing this source of supply, obtained an option to purchase all the issued shares of

*PRESENT: Taschereau, Cartwright, Martland, Judson and Hall JJ.

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P Co. for $50,000. Some two months later, the appellant received an offer of $160,000 for those shares from a third party. The option was then exercised and the shares were resold to the third party for $160,000 and other stated considerations. The Minister treated the profit made on the resale as income. The appellant contended that the option to purchase the shares was a capital asset and that the sale of the shares was a realization of that capital asset. The assessment was affirmed by the Exchequer Court, and the taxpayer appealed to this Court.

Held: The appeal should be dismissed.

This was not a simple purchase and sale of shares. The appellant, having only an option on shares, did not carry out its plan to make the supplier a subsidiary. It exercised the option and sold the shares for cash and other considerations, and this gave both the purchase and sale of the shares a trading character rather than acquisition and realization of a capital asset. The profit was therefore a profit from a business.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], affirming the Minister's assessment. Appeal dismissed.

P. N. Thorsteinsson and *D. J. Johnston,* for the appellant.

T. J. Cross and *D. C. H. Bowman,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—Hill-Clark-Francis Limited appeals from a judgment of the Exchequer Court[1] which held that a profit made on the sale of certain shares in the year 1952 was income and not a capital gain.

The appellant was incorporated in 1913 and carries on business in Northern Ontario on a large scale as a general contractor and as a wholesaler and retailer in lumber. It buys and manufactures lumber, some of which it uses in its construction business; some it sells through its retail outlets, and some it sells in wholesale lots.

A major supplier of lumber to the appellant in 1952 was a company called Poitras Frères Inc. The appellant had contracted in each year since 1943 to purchase the whole annual production of lumber of this company. In the year 1952, Poitras Frères was producing about one-third of the appellant's lumber requirements. To enable Poitras Frères to produce the logs and manufacture the lumber, the appellant made advances from time to time which were to be

[1] [1961] Ex. C.R. 110, [1960] C.T.C. 303, 60 D.T.C. 1245.

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considered as payments on account of the purchase price of the products.

In the winter of 1951-52, Poitras Frères Inc. was in financial difficulties, and in May 1952, the appellant approached the principal shareholder with a view to purchasing all the issued shares of that company. This was done because the appellant feared that if Poitras Frères went out of business, it would lose one of its major sources of supply.

In June 1952, the appellant obtained for $100 from Roger Poitras, the principal shareholder, an option exercisable at any time up to November 20, 1952, to purchase all the issued shares of the company for $50,000. The appellant took an option rather than make an outright purchase of the shares at that time because it was temporarily short of cash on account of the seasonal nature of its business.

In 1943 and 1944, the appellant had acquired control through the purchase of shares of two other lumber companies. In each case its object in making these purchases was to ensure continuing sources of supply. The appellant still controls these subsidiary companies through share ownership and they continue to supply lumber to the appellant.

I am prepared to accept the appellant's submission that in purchasing the shares of Poitras Frères Inc., it was intending to make this company its subsidiary just as it had done with the two companies purchased in 1943 and 1944. But, in late August 1952, a Mr. Horace Strong, who was the majority shareholder in Haileybury Lumber Company, began to negotiate with the appellant for the purchase of the Poitras shares and, in September 1952, the appellant accepted his offer of $160,000 for these shares. The appellant then exercised its option and paid the option price of $50,000 to Roger Poitras, took delivery of the shares and then sold them to Mr. Strong for $160,000.

The agreement of purchase and sale also provided for:

(a) the cancellation of all contracts between the appellant and Poitras. This means that the appellant gave up its right to receive the lumber it had contracted for;

(b) the payment by the appellant of a sum sufficient to reduce the Poitras bank loan to $60,000;

(c) repayment of the appellant's advances to Poitras amounting to approximately $280,0000;

(d) cancellation of the appellant's guarantee of the Poitras bank loan when it was reduced to $60,000.

It is apparent from this outline that this was not a simple purchase and sale of shares. On these facts, the conclusions of the learned trial judge, in my respectful opinion, are correct and unassailable. He found that the appellant, having only an option on shares, did not carry out its plan to make Poitras a subsidiary. It exercised the option and sold the shares for cash and the other stated consideration, and this gave both the purchase and sale of the shares a trading character rather than acquisition and realization of a capital asset. He therefore correctly held that the profit so realized was a profit from a business within the meaning of s. 3(*c*) of the *Income Tax Act* as defined by s. 139(1)(*e*), and was properly treated as income.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman & Elliott, Montreal.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

ALISTAIR FRASER (*Defendant*) .....APPELLANT;

AND

HER MAJESTY THE QUEEN on the Information of the Deputy Attorney General of Canada (*Plaintiff*) .. RESPONDENT.

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*Feb. 20, 21, 22 Oct. 2

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Land taken as source of rock for causeway—No market for rock apart from building of causeway—Compensation for special adaptability—Expropriation Act, R.S.C. 1927, c. 64.

Certain lands of the defendant, comprising 110.1 acres and having a "bare ground" value of about $50 per acre, were expropriated by the Crown for the purpose of opening up a stone quarry on the said lands to provide rock for the building of a causeway. These lands had no value

*PRESENT: Cartwright, Fauteux, Judson, Ritchie and Hall JJ.

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for any purpose other than that for which they were expropriated and there was no prospect of any other commercial exploitation. The Crown later abandoned all the lands with the exception of 12.8 acres and the abandoned lands revested in the defendant. At the time of the expropriation the contract had been let for the construction of the causeway, under authorization of a prior order in council, and there were specific provisions in the contract relating to the rock on the defendant's lands which indicated that these lands were to be the source of the rock for the construction of the causeway and that it would be supplied free to the contractor. The contractor had the right to use rock from any other source that he might choose provided it was equal to or better than the rock contained in the defendant's lands and met with the approval of the engineer.

An action was brought to determine the compensation to be awarded to the defendant in respect of the expropriation of his lands. The defendant appealed and the Crown moved to vary the judgment of the trial judge.

Held (Judson J. dissenting): The appeal should be allowed and the cross-appeal dismissed.

Per Cartwright, Fauteux, Ritchie and Hall JJ.: The plaintiff's contention that the only potential value of the expropriated lands over and above their "bare ground" value was solely and exclusively related to the scheme of constructing the causeway and should accordingly have been excluded in fixing the value for the purposes of compensation failed. *Cedars Rapids Manufacturing and Power Co. v. Lacoste,* [1914] A.C. 569; *Fraser v. City of Fraserville,* [1917] A.C. 187; *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands,* [1947] A.C. 565, considered. None of these cases was authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases, however, made it plain that the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an integral part of the scheme devised by that authority.

The exclusion from the Court's consideration of increase in value consequent on the execution of the undertaking to build a causeway and of any value based on the Crown acting under compulsion as a necessitous purchaser did not mean that the value of the special adaptability to the owner at the date of expropriation was to be disregarded. *Vyricherla Narayana Gajaptiraju (Raja) v. Revenue Divisional Officer, Vizagapatam,* [1939] A.C. 302, followed.

The effective date for valuation of this property was the date of expropriation and the reality of the matter was that the Crown was expropriating tons of rock in the ground rather than acres of land in the rough so that the value of the special adaptability of these lands was to be determined on the basis of the value that a willing vendor might reasonably expect to obtain from a willing but not anxious purchaser for the rock *in situ* at the date of expropriation.

The value of the special adaptability was limited to the 12.8 acres which were retained by the Crown. The value of the 97.3 acres revested in the defendant did not enter into the calculation of the compensation

except to the extent that the defendant was entitled to interest on the value of the whole 110.1 acres from the date of expropriation to the date of revesting.

No amount for compulsory taking was allowed. *Drew v. R.*, [1961] S.C.R. 614, followed.

Per Cartwright and Fauteux JJ.: The statements found in numerous authorities, that the person whose property is taken for the public use shall receive no more than the value of that property to him, did not mean that he is to receive less than the market price where that is ascertainable. *Lake Erie and Northern Railway Co. v. Brantford Golf and Country Club* (1917), 32 D.L.R. 219, referred to. In relation to a case such as the one at bar where what is expropriated is really building material rather than land, the principle underlying the decisions relied on by the plaintiff (other than in *Vézina v. R.*) was that the owner of property taken for the public use shall not receive a price inflated beyond its market value because of the necessities of the scheme for the carrying out of which it is required, not that the owner shall be compelled to take less than the market price which would be paid by any willing purchaser who wanted the material and to whom competitive sources of supply were available. *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam, supra, referred to; Vézina v. R.* (1889), 17 S.C.R. 1, disapproved.

Per Judson J., *dissenting*: Whatever value this property had, other than its value as waste land, it got from the scheme. These lands had no value for their special adaptability for the purpose of quarrying in general, but only for the purpose of quarrying for the needs of the causeway. The scheme and nothing else created the special adaptability and the expropriating authority was not to be charged for the value which it and it alone brought into being. There was only one possible source of value over and above the bare value of the property, and that must be based, not on value to the owner, but on value to the taker. *Vézina v. R., supra; Cunard v. R.* (1910), 43 S.C.R. 88; *Cedars Rapids Manufacturing and Power Co. v. Lacoste, supra; Fraser v. City of Fraserville, supra; Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands, supra,* referred to.

APPEAL and cross-appeal from a judgment of Cameron J. of the Exchequer Court of Canada[1]. Appeal allowed and cross-appeal dismissed, Judson J. dissenting.

J. J. Robinette, Q.C., for the defendant, appellant.

D. S. Maxwell, Q.C., and *P. M. Troop*, for the plaintiff, respondent.

CARTWRIGHT J.:—The facts out of which these proceedings arise are set out in the reasons for judgment of my brother Judson and in those of my brother Ritchie. It is unnecessary to repeat them in detail but I wish to summarize them briefly.

[1] (1960), 23 D.L.R. (2d) 94, 81 C.R.T.C. 53.

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On July 9, 1952, when the appellant's lands were expropriated for the use of Her Majesty in the right of Canada it was already known (i) that the causeway was to be built, (ii) that approximately 9,000,000 tons of rock would be required as material to be used in its construction, (iii) that rock admirably suited to this purpose and in excess of the amount required was contained in the appellant's land, (iv) that its location was such that the costs of quarrying and transportation would be less than in the case of any rock in other locations belonging to other persons, and (v) that there were ample other possible sources of supply although because of their location none would be equally economical. The lands of the appellant were not required to form any part of the bed of the causeway or the approaches thereto; the purpose of the expropriation was simply to obtain a suitable supply of rock. Apart from the requirements for the causeway there was no probability of the appellant selling any substantial quantity of his rock in the forseeable future. The value of the expropriated land if all possibility of selling the rock contained in it was disregarded was about $50 per acre. A prudent contractor bidding on a contract the performance of which would require great quantities of rock to be supplied by him would have been willing to offer and pay from 5 cents to 7½ cents per ton for suitable rock *in situ* in a convenient location.

On these facts there are two sharply conflicting views as to what should be paid to the appellant for the 9,000,000 tons of rock taken from what had been his land and used in the building of the causeway. For the appellant it is said that he should get not less than the minimum market price, that is to say, the price which a willing but not necessitous or driven purchaser would pay to a willing seller, for the quantity of rock required. For the respondent it is said that there would have been no market for the rock apart from the building of the causeway and that the appellant is entitled only to the bare value of his land considered as waste land.

We must deal with the realities of the situation. What was compulsorily taken from the appellant was intended to be used not as land but as a source of building material for which there was an ascertainable market price. The statements found in numerous authorities, that the person whose

property is taken for the public use shall receive no more than the value of that property to him, do not mean that he is to receive less than the market price where that is ascertainable. In *Lake Erie and Northern Railway Co. v. Brantford Golf and Country Club*[1], Duff J., as he then was, said:

> It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. *He is entitled to that in any event . . .*

The words which I have italicized in this passage appear to me to be applicable to the case at bar. Why, it may be asked, should a citizen who happens to own material suitable for use in the building of a public work and in a most convenient location, but of which there are ample available supplies in the hands of other owners, be required to make a gift of his property? I would have thought it plain that the contention of the appellant is the right one were it not for the decision of this Court in *Vézina v. The Queen*[2]. The effect of that judgment, so far as it is relevant to the point before us, is accurately summarized in the first paragraph of the headnote as follows:

> Where land is taken by a railway company for the purpose of using the gravel thereon as ballast, the owner is only entitled to compensation for the land so taken as farm land, where there is no market for the gravel.

I do not find it necessary to enter upon the question, which has sometimes been raised but not, I think, as yet decided, whether strictly speaking this Court is now bound under the principle *stare decisis* by an earlier judgment pronounced by it in a case which was appealable to the Judicial Committee of the Privy Council, for the Court has always been free to reconsider such a judgment if it is found to conflict with a subsequent pronouncement by the Judicial Committee on a point of law. The decision in *Vézina v. The Queen* appears to have been founded on the circumstance that the railway company was the only possible purchaser of the appellant's gravel and, in my opinion, it is inconsistent with the judgment of the Judicial Committee in *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*[3], which is discussed in the reasons of my brother Ritchie.

[1] (1917), 32 D.L.R. 219 at 229. [2] (1889), 17 S.C.R. 1.
[3] [1939] A.C. 302.

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In relation to a case such as the one before us where what is expropriated is really building material rather than land, the principle underlying the decisions relied on by the respondent (other than that in *Vézina*) appears to me to be that the owner of property taken for the public use shall not receive a price inflated beyond its market value because of the necessities of the scheme for the carrying out of which it is required, not that the owner shall be compelled to take less than the market price which would be paid by any willing purchaser who wanted the material and to whom competitive sources of supply were available.

I have reached the conclusion that the appellant is entitled to be paid the fair market price for the quantity of rock taken from his expropriated land. It may be said with some force that on the evidence this should be not less than 5 cents a ton, but for the reasons given by my brother Ritchie I agree with the figure fixed by him.

For the reasons given by my brother Ritchie and those briefly stated above I would dispose of the appeal and cross-appeal as proposed by my brother Ritchie.

FAUTEUX J.:—For the reasons given by my brothers Cartwright and Ritchie, I would dispose of the appeal and cross-appeal as proposed by my brother Ritchie.

JUDSON J. (*dissenting*):—On July 9, 1952, the Dominion Government expropriated 110.1 acres out of a tract of land comprising 392 acres owned by the appellant. The appellant had inherited this land in 1929. It had been owned by his family, one part since 1897 and the other since 1890.

The purpose of the expropriation was to open up a stone quarry on the lands expropriated to provide rock for the building of a causeway across the Strait of Canso from Auld Cove at Cape Porcupine on the south side of the Strait to Balache Point on the north shore of the Strait in Cape Breton Island.

There is a good description of the property in the reasons for judgment of the learned trial judge contained in the following quotation:

> The lots so owned by the defendant are situated on the south shore of the Strait of Canso which divides Cape Breton from the mainland of Nova Scotia. To the south thereof is the main highway leading from Antigonish to Mulgrave. From that highway, which is about 250 ft. above sea level, the land rises to a height of some 650 ft. above sea level, and

at the north dropped abruptly to the shore of the Strait of Canso. The property consisted almost entirely of solid rock with a very shallow overburden of soil in some places. It was and is totally unsuitable for agriculture and such small trees as grew thereon were of no value. The municipal assessment for tax purposes of the entire 392 acres varied over the years from a low of $100 to a high of $300.

So far as is known, the property was never put to any use whatever and no improvements of any sort were made, the only expenditure thereon being the municipal taxes. No effort was made to sell any portion of the land or any rock therefrom; and no offer to purchase was ever received. Up to the date of the expropriation, no plan had been formulated by the owner for the opening of a quarry or the development of the property in any way.

The reasons of the learned trial judge demonstrate that this land had no value for any purpose other than as a site for the stone quarry needed for the construction of the causeway at the time of the expropriation and that there was no prospect of any other commercial exploitation. We are therefore faced in this appeal with this simple situation: whatever value this property has, other than its value as waste land, it gets from the scheme. It is very difficult to think of an expropriation case where this condition and this condition alone prevails. Usually land has some commercial potential apart from the scheme.

An unusual feature of the case is that when the Government expropriated on July 9, 1952, the contract had been let for the construction of the causeway, under authorization of a prior order in council, and there were specific provisions in the contract relating to the rock on the appellant's land which indicated that this land was to be the source of the rock for the construction of the causeway and that it would be supplied free to the contractor who, of course, had to quarry and transport it. The contract estimated the amount of rock fill needed at 9,000,000 tons, for which the contractor was to be paid 59 cents per ton for all rock placed in the causeway.

The appellant's land was the most convenient site for the opening up of a quarry for the supply of rock for the causeway and in addition, as the specifications show, the rock was of a better quality than most of the rock in the immediate neighbourhood in that it was harder and contained less material which would be subject to attrition by weather. It could be quarried in large blocks suitable for protecting the sides of the causeway. The contractor had

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the right to use rock from any other source that he might choose provided it was equal to or better than the igneous rock of Cape Porcupine Hill and met with the approval of the engineer.

I have not the slightest doubt that the appellant's local knowledge, both geological and geographical, and his awareness of the economic necessity of a better crossing from the mainland to Cape Breton Island always enabled him to conclude that if the Government chose to build a causeway he would be near the site and that they would have to come to him for a supply of rock.

There had been much public discussion of the project going back at least to 1943 and probably earlier. In 1943 both the House of Assembly of the Province of Nova Scotia and the Maritime Board of Trade passed a resolution asking the Government of Canada to investigate the practicability of constructing a causeway. In 1944 the Dominion Steel and Coal Company Limited made a report on the project. In 1945 the Dominion Government made a geological map of the Strait. In 1949 a board of engineers appointed by the Dominion Government and the Province of Nova Scotia reported that three projects had been studied and recommended the construction of a low-level bridge. This report is known as the Pratley Report and is the first reference that I can find in the evidence to a low-level bridge. In 1950 the Minister of Transport reconvened the Pratley Commission. It had been decided by this time that the low-level bridge was not a practical solution to the problem. On December 8, 1950, the Province of Nova Scotia expropriated the lands of the appellant. In June of 1951 the Pratley Board reported that in view of the elimination of the bridge project and because of the high cost of improving the ferry, the causeway scheme was the only practical solution. The Board also recommended that the site of the causeway be the same as the site of the proposed low-level bridge, and referred to Porcupine Mountain (the appellant's land) as a source of supply for rock. On October 17, 1951, Cabinet approval was given to the construction of the causeway by the Government of Canada. Consulting engineers were then instructed to prepare plans for the design and supervision of the construction of the causeway. These were completed on March 31, 1952. Tenders were

then invited and on June 18, 1952, the construction contract was signed, under authorization of an order in council of May 16, 1952. On July 9, 1952, the Province of Nova Scotia abandoned its expropriation and fifteen minutes later the Dominion Government expropriated 110.1 acres by filing the necessary plans and description in the registry office. The Crown indicated its willingness to pay $5,505 for the expropriated lands.

Therefore, at the time of the Dominion expropriation, the ownership of the property had been in the appellant for a period of fifteen minutes after an interval of eighteen months, and at this time the Dominion Government's scheme for a causeway was fully formulated. The Dominion filed its information on July 30, 1954, and offered $5,505 for compensation. In his defence, filed on March 21, 1955, the appellant claimed $5,000,000 plus 10 per cent for compulsory taking. On July 2, 1955, the Government amended its information and abandoned all the lands except 12.8 acres. The abandoned lands at that time revested in the defendant. The original offer of the Government of $5,505 remained as before. The defendant then amended his defence to reduce his claim to $1,000,000 plus 10 per cent. The task of the trial judge was therefore to determine the value to the owner of the 110.1 acres expropriated in 1952, taking into account, in accordance with s. 24 (4) of the *Expropriation Act,* the fact of abandonment and revesting in the appellant of a large part of the area.

Cameron J. made an assessment of $40,640. He first determined the market value of the 110.1 acres taken from the appellant on July 9, 1952, without any reference to its special adaptability for use for a quarry site for rock. Taking the evidence as a whole, he concluded that $50 per acre would reasonably represent the full market value of the 110.1 acres exclusive of the value of any special adaptability as a quarry site to be used for the supply of rock for the causeway. He then determined the value of the special potentiality. After reviewing the evidence concerning the history of the causeway and concluding that a willing purchaser, in the circumstances and not acting under compulsion, would, in view of his requirements, pay something in excess of the bare value of the land, and after considering the evidence of two Crown appraisers that the value of the

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potentiality was from $25,000 to $30,000 he reached the conclusion that the value of this potentiality was not in excess of $40,000. He then took into consideration the abandonment and concluded that the value of the 97.3 acres which revested in the appellant was the same as of the date of the expropriation, *i.e.* $50 per acre and, therefore, he deducted the sum of $4,865 leaving a net amount of $40,640. He rejected the appellant's claim for injurious affection for lack of any evidence as to the value of such loss. He also found that there was no advantage or benefit to the appellant arising out of the construction of the causeway that he should take into account under s. 49 of the *Exchequer Court Act*. He awarded the appellant an allowance of 10 per cent for compulsory taking together with interest.

The Crown submits that any increase in the value above the bare market value of $50 per acre as waste land was entirely attributable to the scheme and should be disregarded in assessing compensation. Cameron J. rejected this and held that he must ascertain the value of whatever potentialities there were and determine what would be paid by a willing purchaser to a willing vendor of the land with its potentialities in the same way that he would ascertain it in a case where there are several possible purchasers, and that he could not confine himself to an award based on the value of the land as waste land.

In doing this he followed *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*[1], which held that this must be done even where the expropriating authority was the only possible purchaser. The judgment in the Indian case was based upon disapproval of the dictum of Fletcher Moulton L.J. in *Re Lucas & Chesterfield Gas & Water Board*[2] and adoption of the contrary opinion of Vaughan Williams L.J. in the same case.

Cameron J. then arrived at a figure of $40,000 for special adaptability. He said that before October 17, 1951, (the date of the order in council) there was always the chance that this land might be needed for a quarry for the causeway, and that before this date a contractor who might expect to tender for the construction contract if ever the causeway scheme were decided upon and tenders called for, might

[1] [1939] A.C. 302.

[2] [1909] 1 K.B. 16 at 31.

have risked an outlay of between $25,000 and $30,000 on the property and he had some evidence before him to this effect. He next held that after the date of the order in council any increase in the value of the special adaptability of the land to a causeway scheme resulted from the definite adoption of the scheme and was to be disregarded. On this point, in my respectful opinion, he was clearly right. He correctly instructed himself that he had to ascertain value to the owner, including any special adaptability as of the date of expropriation, but he also held, correctly, in my opinion, that there could be no increase in value between the date of the order in council and the date of expropriation. If Cameron J. was entitled to consider and value a special adaptability of this kind immediately before the date of the order in council, I would accept his valuation. To me he made the maximum possible award in favour of this claimant and the question is whether the claimant was entitled even to the $40,000.

Any increase in value over $50 per acre was entirely the result of the scheme no matter what date one chooses to look at the problem. The $40,000 that the trial judge awarded was just as clearly in this classification as the $1,000,000 which the appellant claimed in his defence. These lands had no value for their special adaptability for the purpose of quarrying in general, but only for the purpose of quarrying for the needs of the causeway. The scheme and nothing else created the special adaptability in this case and I do not think that the expropriating authority is to be charged for the value which it and it alone brought into being.

The appellant's case to me depends upon the unacceptable principle that there is a value to him for which he should be compensated because of the needs and purpose of the expropriating authority. These needs and the purpose are unique. No one else had these needs and no one else could have used the rock for that purpose. The Crown was expropriating some 12 acres of land for the purpose of opening up a quarry. It is the purpose and the use of the rock that creates value. Yet the appellant is claiming compensation as though the power of expropriation had not been exercised and he had been left to deal with a private undertaker upon whom he could have imposed his own

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terms, within the limits of competition. There is only one possible source of value in this case over and above the $50 per acre, and that must be based, not on value to the owner, but on value to the taker.

A similar problem came up in this Court as early as 1889 in the case of *Vézina v. The Queen*[1]. In that case the land was taken for railway purposes and for a gravel pit in connection with the construction of the railway. Patterson J. said:

> The learned judge has allowed $807.70 for the land taken, being $100.00 per arpent. This valuation is not complained of so far as the five arpents taken for the track are concerned, and it is not asserted that the three arpents taken for the gravel pit were, as farm lands, of any greater value. But the claimant insists that it shall be valued with reference to the gravel, some 45,000 cubic yards, taken from it, as if he had sold the gravel at so much a yard. The learned judge considered that those three arpents were, to the owner, simply three arpents of his farm, not rendered any more valuable to him by the existence of a bed of gravel under the soil, as there was no market for gravel, and it became of value to the Government only because the railway required it for ballast.

In *Cunard v. The King*[2], Duff J. said:

> One principle by which the courts have always governed themselves in estimating the compensation to be awarded for property taken under compulsory powers is this: you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence. The proper application of that principle to chapter 143, R.S.C., seems to me to be this—you are to estimate the value as if the property were not required for the public purpose to which the Minister, who is taking the proceedings, intends to devote it. The circumstance that it is so required is not to enter into the computation of value as either enhancing or diminishing it.

This was written in a dissenting judgment, but I am not aware that the principle so stated is open to any question.

Cedars Rapids Manufacturing and Power Co. v. Lacoste[3] and *Fraser v. City of Fraserville*[4] are illustrations of this principle. Both were cases of expropriation for the purpose of power development. The expropriated owner happened to be in a favourable situation on the site of the development and without the power of expropriation he was in a position to hold up the scheme and name his own price. In both cases the arbitrator awarded compensation based upon value to the taker and not to the owner. In each case it was held to be wrong to assess compensation on the basis that

[1] (1889), 17 S.C.R. 1.
[2] (1910), 43 S.C.R. 88 at 99.
[3] [1914] A.C. 569.
[4] [1917] A.C. 187.

the expropriated owner had made a proportionate contribution to the development of the power. This is merely one aspect, as was pointed out in the *Fraser* case, of value to the buyer and not value to the owner. In reviewing the *Cedars Rapids* case, which had recently been before the Privy Council, Lord Buckmaster said:

> The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board, Cedars Rapids Manufacturing & Power Co. v. Lacoste,* and *Sidney v. North Eastern Ry. Co.* The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that his award cannot be supported.

I cannot see that there is any question of these principles or that they are affected in any way by any possible misapprehension of the supposed unanimity of opinion between Vaughan Williams L.J. and Fletcher Moulton L.J. in *Lucas and Chesterfield.*

It is not a question here of a possibility of the Dominion Government acquiring powers of expropriation. It always had these powers and it was the only authority that could exercise them. In this situation it does not create the market and then have to pay for the value so created.

The task then is to test how an award of $40,000 plus $50 per acre fits in with the concept of value to the owner as developed in this Court through *Irving Oil Co. Ltd. v. The King*[1], *Diggon-Hibben Ltd. v. The King*[2], and finally in *Woods Manufacturing Co. Ltd. v. The King*[3]. What would the claimant, as a prudent man at the moment of expropriation, (he then being deemed as without title, but all else remaining the same) pay for the property rather than be ejected from it. Any readiness to pay anything above the value as waste land can only come from the fact that a causeway is to be built.

In my opinion, *Pointe Gourde Quarrying and Transport Co., Ltd. v. Sub-Intendent of Crown Lands*[4], is directly in

[1] [1946] S.C.R. 551, 4 D.L.R. 625. [2] [1949] S.C.R. 712, 4 D.L.R. 785.
[3] [1951] S.C.R. 504, 2 D.L.R. 465. [4] [1947] A.C. 565.

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point. There an owner was expropriated in Trinidad by the Crown for the purpose of enabling the United States to construct a naval base. On part of the land expropriated there was an operating quarry. The owner was compensated on proper grounds for the quarry as an operating quarry. In addition to this the Court awarded the sum of $15,000 because this quarry was particularly useful to the United States for the construction of its naval base. On this aspect of the award the Privy Council said at p. 572:

> It follows from this that the question as submitted to the Full Court should have been answered in the negative. But it does not follow that this part of the award can stand. It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by Eve J. in *South Eastern Ry. Co. v. London County Council*: 'Increase in value consequent on the execution of the undertaking for or in connexion with which the purchase is made must be disregarded.' This rule was recognized by the Full Court and, indeed, appears to be the basis of its main conclusion, for in the course of his judgment Blackall C.J., after a reference to Lord Buckmaster's statement of the principle in *Fraser v. Fraserville,* proceeds: 'In the present case, although a value as a quarry had admittedly been created prior to the acquisition, that value was increased by the fact that a base was being established in the vicinity for which a large quantity of stone in a readily accessible situation was required. In other words, the value was enhanced by the scheme of the party acquiring the land, and that is not a factor for which additional compensation may properly be awarded.'

My judgment therefore is that this claimant is entitled to nothing beyond $50 per acre plus interest. The appeal should be dismissed with costs. I would allow the cross-appeal with costs to the extent of eliminating the $40,000 award and the 10 per cent compulsory taking. The result is that the appellant is entitled to an award of $640 for 12.8 acres at $50 per acre plus interest. The appellant should pay the costs of the trial.

The judgment of Ritchie and Hall JJ. was delivered by

RITCHIE J.:—The appellant has appealed and the Crown has moved to vary a judgment of Cameron J. of the Exchequer Court of Canada[1] fixing the amount of compensation to be awarded to the appellant in respect of the expropriation of certain of his lands being a part of Porcupine Mountain, so called, at Cape Porcupine in the County of Guysborough, Nova Scotia, which lands were, at the time of the expropriation, known to be the source

[1] (1960), 23 D.L.R. (2d) 94, 81 C.R.T.C. 53.

from which an estimated 9,000,000 tons of rock was to be obtained for use by the Crown in the construction of a causeway between Cape Breton Island and the mainland of Nova Scotia.

Ways and means of joining Cape Breton Island to the mainland had been widely discussed for many years before the Nova Scotia Legislature passed its resolution of April 12, 1943, in the following terms:

> BE IT THEREFORE RESOLVED that the Government of Canada be asked by this Legislature to investigate the railroad ferry at the Strait of Canso with a view to the construction of a causeway, thereby eliminating this bottleneck in traffic which has been the greatest drawback to industrial production in Cape Breton Island.

Porcupine Mountain, at least 110.1 acres of which were owned by the appellant, abuts on the south shore of the Strait of Canso and it appears to have been recognized at an early date as a convenient source of suitable supply of rock if a causeway were to be adopted as a means of crossing the Strait so that the subject of the above resolution was not unrelated to the future value of the appellant's lands.

Between 1943 and 1950, the crossing of the Strait of Canso was made the subject of study and report by the Dominion Steel and Coal Company, the Maritime Board of Trade, the Dominion Government and others, and the alternative solutions of a causeway, a low-level bridge, and a tunnel were all considered. The Strait of Canso Board of Engineers had at first reported to the Dominion Government in favour of a low-level bridge but on September 28, 1950, the then Minister of Transport wrote to all the former members of that Board advising them that the engineers of the Canadian National Railways and of the Province of Nova Scotia "were of the opinion that a low-level bridge was not practicable" and the Board was accordingly reconvened to review its earlier findings and "to recommend the best method of improving the present rail and highway transportation facilities across the Strait . . .". On December 8, 1950, after the Board had been reconvened, but before its final report was issued, the Province of Nova Scotia acting under the authority of the *Expropriation Act*, R.S.N.S. 1954, c. 91, expropriated certain lands near the Strait including 110.1 acres of the appellant's lands on

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Porcupine Mountain which were subsequently expropriated by the Dominion Government, and in the following June the Board reported that the causeway scheme was the only practical solution to the problem and that recent borings had confirmed the long held view that Porcupine Mountain contained a suitable supply of rock for its construction.

On October 17, 1951, formal Cabinet approval was given to the construction of the causeway and on June 8 of the following year the Crown entered into a contract with Northern Construction Company and J. W. Stewart for the performance of the necessary work which contract contained a provision that

> if the quarry is located south of Auld Cove between Highway No. 4 and the Strait of Canso, the Department will also provide the quarry site without cost to the contractor. If he chooses any other quarry site it shall be provided at his own expense.

The quarry site which was to be provided without cost is on the appellant's lands and the total amount of rock fill required was estimated at 9,000,000 tons. The specifications also provide that the contractor was to be paid 59 cents a ton for all rock placed in the causeway. This was presumably compensation for quarrying, transporting and placing the rock.

At the time when this contract was entered into title to the land formerly owned by the appellant at Porcupine Mountain was vested in the Province of Nova Scotia pursuant to the expropriation proceedings taken on December 8, 1950, but on July 9, 1952, for reasons which are not explained in the evidence, the Province filed a notice of abandonment which had the effect of revesting title in the appellant so that he was the owner when, 15 minutes after the notice had been filed by the Province, a plan and description of 110.1 acres of this land, signed by the Deputy Minister of Transport, was filed by the respondent thus causing it to be expropriated for the use of Her Majesty the Queen in the right of Canada in accordance with s. 9 of the *Expropriation Act*, R.S.C. 1927, c. 64.

The present proceedings were commenced on August 3, 1954, by the Deputy Attorney General of Canada filing an information seeking to have the compensation to be paid for the 110.1 acres expropriated as aforesaid determined by

the Exchequer Court in accordance with s. 27 of the *Expropriation Act*. The Crown offered the appellant the sum of $5,505 in full satisfaction of all claims, and by way of defence the appellant claimed the sum of $5,500,000.

On May 9, 1955, all the lands of the appellant so taken, with the exception of 12.8 acres, were declared to be abandoned by Her Majesty under s. 24 of the *Expropriation Act* and thereby revested in the appellant, but when the Crown amended its information on June 2, 1955, to conform to this abandonment it is somewhat significant to observe that the same compensation ($5,505) was offered in respect of the remaining 12.8 acres as had originally been offered for the 110.1 acres.

In amending the information on June 2, 1955, and again on June 20, 1956, the Crown gave an undertaking pursuant to s. 31 of the *Expropriation Act* to grant to the appellant an easement for the purpose of a right of way from the public highway to the 97.3 acres which had been abandoned to the appellant and thus to enable the appellant to use the 12.8 acres expropriated except the portions thereof occupied by loose rock already quarried on behalf of Her Majesty, in order to remove rock from the lands abandoned to the appellant and to operate a rock crushing plant. On June 7, 1955, and again on September 9, 1957, the statement of defence was amended and the appellant pleaded that he was willing to accept the sum of $1,100,000 by way of compensation for expropriation of the smaller area.

In determining the amount of compensation to be paid to the appellant under these circumstances the learned trial judge based his award on the "bare ground" or "agricultural" value of the land being $50 per acre and he found that the 12.8 acres retained by the Crown had an additional value by reason of its special adaptability as a source of rock which he fixed at $40,000; after deducting the value of the 97.3 acres which had been abandoned by the Crown he thus found the 12.8 acres to have a value of $40,640 to which he added 10 per cent for compulsory taking. He also awarded interest at the rate of 5 per cent per annum on the value which he had found for the lands originally taken ($49,569) from the date of expropriation to the date of abandonment, and on the amount of $44,704 from the date of the abandonment of the 97.3 acres to the date of his judgment. From this

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award the appellant appeals on the ground that the learned trial judge failed to give sufficient weight to the value of the special adaptability of the lands for causeway construction, that he erred in failing to award any compensation for the increase in the value of the lands between the date when the causeway project was approved by the Cabinet (October 17, 1951) and the date of expropriation, and finally that he erred in holding that the lands had no value for special adaptability as a rock quarry for purposes other than the causeway.

The respondent seeks to have the judgment varied so as to exclude any award for special adaptability or in the alternative so as to reduce such an award from $40,000 to $30,000 and, in any event, to set aside the award of 10 per cent for compulsory taking.

The respondent's counsel contends that the only potential value of the expropriated lands over and above their "bare ground" value was "solely and exclusively related to the scheme of constructing the causeway" and should accordingly have been excluded in fixing the value for the purposes of compensation. The leading authorities cited in support of this contention are: *Cedars Rapids Manufacturing and Power Co. v. Lacoste*[1]; *Fraser v. City of Fraserville*[2], and *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands*[3]. None of these cases is, in my opinion, authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases do, however, make it plain that the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an integral part of the scheme devised by that authority.

In the *Cedars Rapids* case, *supra,* Lord Dunedin stated the matter thus, at p. 576:

> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability . . .

[1] [1914] A.C. 569.
[2] [1917] A.C. 187.
[3] [1947] A.C. 565.

is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

It seems plain that the element of value which Lord Dunedin excluded in fixing compensation was the value as "a proportional part of the assumed value of the whole undertaking . . .". If there were any doubt about this, it is made plain at p. 577, where it is said:

> Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realized undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony.

In *Fraser v. City of Fraserville, supra,* the original arbitrator had taken into consideration the value which the lands would have after expropriation as a part of the hydro-electric system to be operated by the City of Fraserville, and Lord Buckmaster observed, at p. 193:

> . . . in truth the value which Mr. St. Laurent (the arbitrator) fixed was the value of the property to the person who was buying and not to the person who was selling and it was not this value that he was appointed to determine.

In the *Pointe Gourde* case, *supra,* which is particularly relied upon by the respondent, the British Crown authorities expropriated the appellant's lands in Trinidad which were required by the United States of America in connection with the establishment of a naval base. The situation was that the appellants owned and operated a stone quarry situate on the expropriated lands which had a special suitability and adaptability for the purpose of producing and marketing quarry products and as such had a market value as quarry land prior to the acquisition. The original award of compensation made due allowance for the value of the quarry as a going concern and for the special adaptability of the land as a quarry but the item in dispute was a special award of $15,000 which related

> not to the special suitability or adaptability of the land for the purpose of quarrying which existed before the acquisition, but to the special

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adaptability (to follow the language of the tribunal) which the quarry land possessed after acquisition in that its proximity to the naval base under construction made it specially suited to the needs of the United States.

It is to be noted that the "special suitability" for which the additional $15,000 award was made could not arise until after the acquisition of the land by the British Crown and after the lands had been leased to the United States Government for the purpose of building the base and that it only came into being because of the "special needs of the United States".

In giving his reasons for disallowing this item, Lord Macdermott further indicated what he meant by "an increase in value which is entirely due to the scheme . . ." when he said, at p. 572:

> It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by Eve J. in *South-eastern Railway Co. v. London County Council* [1915] 2 Ch. 252 at 258: "increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded".

Earlier in his judgment, Lord Macdermott had characterized "the use of the quarry stone in the construction of the naval base" which is the subject of the disputed item as being "at most . . . but a circumstance which added to the value to the United States of the use of the land as a quarry".

The exclusion from the Court's consideration of "increase in value consequent on the execution of the undertaking" to build a causeway and of any value based on the Crown acting under compulsion as a necessitous purchaser, does not mean that the value of the special adaptability to the owner at the date of expropriation is to be disregarded.

In this regard, like the learned trial judge, I adopt the reasoning of Lord Romer in the case of *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*[1] (hereinafter referred to as the "Indian" case) where he makes the following comment on the judgment of Rowlatt J. in *Sidney v. North Eastern Ry. Co.*[2] Lord Romer there said, at pp. 322-323:

> If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor,

[1] [1939] A.C. 302.

[2] [1914] 3 K.B. 629.

and not the price that would be paid by a "driven" purchaser, to an unwilling vendor, their Lordships agree. But so far as it means that the possibility of the promoter as a willing purchaser, being willing to pay more than other competitors, or in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality is to be disregarded, their Lordships venture respectfully to differ from the learned judge.

For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in the case where there are several possible purchasers and that he is no more confined to awarding the land's "poramboke" value in the former case than he is in the latter.

Although recognizing that an allowance must be made for the value of the special adaptability of the property in question as a source of rock for the causeway, the learned trial judge felt himself bound to assess the value in relation to the market which would have ruled if the lands had been put up for sale immediately before October 17, 1951, when Cabinet approval was given to the scheme, and in so doing he was governed by his interpretation of the following quotation from Cripps on Compulsory Acquisition of Land, 10th ed., at p. 4040, where it is said:

> The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the purchaser had secured any powers or acquired the other subject which made the undertaking a realized possibility.
>
> This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded.

In apparent reliance on this authority, the learned trial judge went on to hold:

> In Canada, of course, the powers of the Crown to expropriate property for public works are statutory and ordinarily no special Act is required. It seems to me, however, that when Cabinet approval was given to the construction of the causeway on October 17, 1951, the undertaking of the construction thereof became a realized possibility and ceased to be a mere potentiality. The value of the lands expropriated, together with the special adaptability "must be tested in relation to the market value which would have ruled had the land been exposed to sale prior to that date". The subsequent preparation of the plan, the call for tenders, and the letting of the contract were merely steps in carrying out the scheme to which the Crown was already committed, and of themselves could not, in the circumstances, be considered as adding to the potential value to the special adaptability.

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With the greatest respect, I am unable to treat the giving of Cabinet approval to the construction of the causeway as being equivalent to the exercise of powers of expropriation over the appellant's lands. In the case of an expropriation by the Crown in the right of Canada no question arises of securing special powers and in the present case there was no occasion to acquire the other land upon which the public work was to be constructed as the Strait of Canso was the property of the federal government. For these reasons in applying the language used by Cripps on Compulsory Acquisition of Land to the present circumstances it should, in my opinion, be read as meaning that:

> The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the powers of expropriation had been exercised.

This same view was expressed by Roach J.A. in *Agnew v. Minister of Highways*[1], with reference to the statutory power of expropriation conferred upon the Minister of Highways of Ontario.

By giving Cabinet approval to the plan to construct a causeway the Crown made it known that there was a probable rather than a possible market for the appellant's rock at the price which a willing purchaser would pay to a willing vendor, but taking this factor into consideration in fixing the value of the land is by no means the same thing as determining the value on the basis that the use of the appellant's rock as a part of the undertaking for the construction of the causeway had become a realized possibility.

The significance of the phrase "realized possibility" as employed in the authorities is illustrated by the following excerpt from the reasons for judgment of Lord Romer in the *Indian* case, *supra,* at p. 313:

> No one can suppose in the case of land which is *certain,* or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value the possibility of its being used for building purposes will have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that . . .

[1] [1961] O.R. 234 at 239, 27 D.L.R. (2d) 82.

is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.

When the property in question was taken from the appellant by the Province of Nova Scotia in 1950, the potential market for the rock which it contained was still a matter of speculation as no decision had been finally made about the causeway but when the lands were reacquired by the appellant on July 9, 1952, the years of speculation, study and planning concerning the building of this causeway had already culminated in the letting of a contract for its construction which contemplated the use of an estimated 9,000,000 tons of rock from these lands, and the potential market for this commodity had thus become a reality before the lands were reacquired by the appellant. It was these lands, with this potentiality, which were expropriated by the Dominion Government, and it is their value at the time of that expropriation which is required to be assessed for the purposes of compensation. In this regard, s. 46 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, provides that:

> 46. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess *the value or amount thereof at the time when the land or property was taken,* or the injury complained of was occasioned.

The Crown called two expert witnesses who gave their respective opinions as to the value of the land based on the merest possibility of a market existing for the rock which it contained. The nature of the question which they were both asked is reflected in the answer of Mr. Scrivener when he stated the advice which he would have given to a contractor as to what should be paid for the property. He said:

> Then if we put it on the basis that it is just a possibility but the thing has not crystallized very much, what the contractor would be doing in such a case would be investing a little money in the hope of this event coming to pass. It is a speculative investment; I would not suggest in such a case that he invest more than, perhaps, twenty-five, might be thirty thousand dollars on such a speculation, because there are many links between that and his profit from it.

In answer to the same question, Mr. Piette said:

> Yes, my answer to that would be twenty-five thousand dollars based on the fact that it took about 12.8 acres and that the maximum value that I would give to such a land would be $2,000 per acre.

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Although the action of the government authorities in making available to the contractor 9,000,000 tons of the appellant's rock before taking any steps to acquire his property does not mean that the land is to be valued for the purpose of compensating the owner as if it were being sold to a necessitous purchaser or as if the rock which it contained were already a part of the causeway, it nevertheless does mean that before the date of expropriation the Crown had disclosed itself in the role of "a willing purchaser" and this is the circumstance which appears to me to take the matter out of the field of speculation and to make it altogether unrealistic to value the land as if the market for the rock which it contains "is just a possibility but the thing has not crystallized very much."

The learned trial judge concluded that the value of the special adaptability was somewhat in excess of the values placed thereon by Scrivener and Piette because those witnesses were not fully aware of, and had therefore not taken into consideration, all the facts which indicated as of October 17, 1951 "that the causeway might be built at the place finally chosen". There is, however, nothing in the judgment appealed from to indicate that the learned trial judge departed from the acreage basis on which the Crown witnesses had valued the special adaptability.

On the other hand, with the greatest respect for Mr. Justice Cameron's opinion, I adopt the view that the effective date for valuation of this property is the date of the expropriation and that the reality of the matter is that the Crown was expropriating tons of rock in the ground rather than acres of land in the rough so that the value of the special adaptability of these lands is to be determined for the purpose of fixing compensation for their expropriation on the basis of the value that a willing vendor might reasonably expect to obtain from a willing but not anxious purchaser for the rock *in situ* at the date of expropriation. In this latter regard, I am much influenced by the evidence of John D. Stirling, a disinterested contractor of high repute and wide experience whose company (E.G.M. Cape & Company) estimated the value of the rock with a view to includ-

ing this item in its tender for the contract to construct the causeway. This witness gave the following evidence:

> In estimating the value of the rock we were not at all certain as to whether we were going to have to pay a royalty to the Dominion Government Department of Transport or not. Based on a good deal of past experience, and not knowing who the owner was, we said: "Well, we may have to pay ten cents a ton for this if he is a hard man to deal with; if not we may get it for five cents a ton, which is what we had previously paid for rock in various places. We came to the conclusion that we should include the sum of seven and a half cents in our estimate per ton. After that we thought we had better clear up this vague clause in the specification, called the engineers and they told us that there was no charge to be made—no royalty to be paid, and therefore we did not include it.

The same witness was then asked:

> Q. What would you say a fair price for that granite would be per ton?
>
> A. I would have offered five cents.
>
> Q. Would that be on the high or on the low side?
>
> A. That would be on the low side. I naturally would not offer any more than I was prepared to pay.
>
> * * *
>
> Q. Between a willing purchaser and a willing vendor, what would you expect to get that granite for?
>
> A. We hoped we would not have to pay more than seven and a half cents, but I hoped we would get it for five. That was our thinking at the time.
>
> Q. Somewhere between seven and a half and five cents?
>
> A. Yes.
>
> Q. If you had tendered on the basis of paying for the rock how much would you have added to your tender?
>
> A. We would have added seven and a half.

If the special adaptability of the lands is to be measured in terms of the value of the rock *in situ* the quantity involved must, in my opinion, be treated as being the amount of the requirement estimated by the Crown before expropriation, *i.e.*, 9,000,000 tons. This constituted an immediate market for a substantial amount of the appellant's rock, and the unprecedented opportunity to dispose of such a quantity of his supply at one time must, in my view, be treated as a circumstance which would induce a prudent man to willingly accept less than he might expect to receive if he was required to sell the commodity piecemeal but, with all respect, it does not, in my opinion, mean that such a man should be required to accept less than one-tenth of the amount which an experienced contractor would have

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been prepared to pay if he had had to include the rock in his tender for the contract, and this appears to me to be the effect of the value fixed by the learned trial judge.

While the evidence of Mr. Stirling is not conclusive as to the value of the rock to the owner, I think it must nevertheless be accepted as establishing that in offering to provide "the quarry site without cost to the contractor" the respondent was offering free of charge a source for its estimated requirement of 9,000,000 tons of rock for which a most reliable and experienced contractor would otherwise have been prepared to pay at least $450,000.

Having regard to all the matters hereinbefore mentioned and taking into account the fact that the value fixed by a contractor as part of a tender may be a very different thing from the value to the owner before expropriation, I have nevertheless reached the conclusion that the appellant would, under the circumstances, have been justified in expecting to obtain a price for his property from a willing purchaser based upon its proven adaptability as a source of the estimated amount of rock required for the causeway being measured in terms of that rock *in situ* having a value to the owner of four cents a ton at the time of expropriation. I accordingly fix the amount of compensation to which the appellant is entitled in respect of the special adaptability of the expropriated lands as a source of rock at $360,000.

I agree with the learned trial judge that in applying the provisions of s. 24(4) of the *Expropriation Act* the 97.3 acres which were abandoned by the Crown and revested in the appellant in 1955 should be treated as having the same "bare ground" value which it had at the date of expropriation, *i.e.* $50 per acre, and that the value of the special adaptability of the property is to be limited to the 12.8 acres which were retained by the Crown and which also had a "bare ground" value of $50 per acre, *i.e.* $640. Section 24(4) of the Act reads as follows:

> The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

In a case such as this where the value of the land revested is equal to its value at the time of the initial taking, the owner is in the position of having received in property "the

equivalent in value to him of the property taken as of the date . . . of the filing of the plan", to adopt the words used by Duff J., as he then was, in *Gibb v. The King*[1] which were applied by Abbott J. in *Standish Hall Inc. v. The Queen*[2].

It accordingly appears to me that the value of the 97.3 acres revested in the appellant does not enter into the calculation of compensation in this case except to the extent that the appellant is entitled to interest on the value of the whole 110.1 acres, *i.e.* $5,505, from the date of expropriation to the date of revesting.

Having regard to the decision of this Court in *Drew v. The Queen*[3], I would not allow any amount for compulsory taking.

I agree with the learned trial judge that the appellant's claims for injurious affection and loss of right of access to the shore of the Strait of Canso should be disallowed and, like him, I am unable to see any merit in the Crown's contention that the construction of the causeway at a point convenient to the lands retained by the appellant has increased the value of his lands so as to give rise to a set-off in favour of the Crown under the provisions of s. 49 of the *Exchequer Court Act*.

In the result, I would allow this appeal, dismiss the main cross-appeal, and vary the judgment of the learned trial judge by fixing the amount to which the appellant is entitled for the expropriation of his property and for all damages resulting therefrom at the sum of $360,640 together with interest at the rate of 5 per cent per annum on the sum of $365,505 from the date of the expropriation (July 9, 1952) to the date of abandonment (May 9, 1955), and on the sum of $360,640 from May 9, 1955, to the date hereof.

The appellant should have his costs of this appeal and of the cross-appeal.

Appeal allowed and cross-appeal dismissed with costs, JUDSON J. *dissenting.*

Solicitor for the plaintiff, respondent: E. A. Driedger, Deputy Attorney General of Canada, Ottawa.

Solicitor for the defendant, appellant: Donald McInnes, Halifax.

[1] (1915), 52 S.C.R. 402 at 430. [2] [1963] S.C.R. 64 at 71 and 72.
[3] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.

1963
*May 13, 14
Oct. 2

ST. LAWRENCE PETROLEUM LIMITED, THEODORE W. BENNETT and JAMES G. BENNETT (*Plaintiffs*) APPELLANTS;

AND

BAILEY SELBURN OIL & GAS LTD. and H. W. BASS & SONS, INC. (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA. APPELLATE DIVISION

Mines and minerals—Participation agreements—Right to share in net proceeds of production—Nature of participant's interest—Not registrable under The Mines and Minerals Act, 1962, (Alta.), c. 49.

The holders of two Crown leases entered into a farm-out agreement with B. Co., whereby the latter was granted the right to earn, by the drilling of a test well in accordance with the provisions of the agreement, a specified interest in the lands involved. B. Co. then entered into two similar participation agreements, one with a syndicate, whose interest was later acquired by the plaintiff company, and the other with an individual, whose interest was obtained on behalf of himself and his brother, both of whom were also plaintiffs. The defendant, B.S. Co., was the assignee of B. Co. Under the provisions of clause 10b of the agreements the company assigned to the participant "such an undivided interest in the petroleum and natural gas . . . as will, upon the said lands being operated by the Company and the production therefrom being sold . . . yield to the Participant the percentage of net proceeds of production as herein defined . . ." The plaintiffs contended that the said clause gave them an assignable interest in the lands defined in the agreements, capable of registration, and with a right to receive and sell their share of production from the lands. An action to obtain a declaration to that effect was dismissed by the trial judge and an appeal to the Appellate Division of the Supreme Court of Alberta was dismissed by a unanimous decision. The plaintiffs appealed to this Court.

Held: The appeal should be dismissed.

The essence of each agreement was that, by participating in the cost of drilling a producing well upon the lands in question to the extent of the stipulated percentage of cost, the participant would become entitled to receive the stipulated percentage of the net proceeds of production of such well. "Net proceeds of production" as defined referred to an amount of money. The intention of the whole agreement was that the operation of each well and the production and marketing of its products was to be under the sole control of the defendant. The participant had a right only to share in the money proceeds obtained either from the sale of the products by the company or from the sale by the company of the lands themselves. Clause 10b did no more than make the defendant a trustee of the

*PRESENT: Cartwright, Abbott, Martland, Judson and Hall JJ.

interest which it acquired under the farm-out agreement for the purposes of the participation agreements and the plaintiffs beneficiaries in respect of equitable interests which should be equivalent to their shares of the money proceeds of the sale of production.

The plaintiffs did not obtain, by virtue of clause 10b, an undivided interest in land capable of assignment by itself. It was an interest which was tied to an interest in the monies to be derived from the sale of production; an interest which would yield a certain percentage of a part of the income from each producing well in which the participant had participated. It would be capable of assignment only as a part of an assignment by the plaintiffs of their interest in the agreements themselves.

The plaintiffs' interest could not be registered under *The Mines and Minerals Act, 1962*. Clause 10b did not provide for a specified undivided interest in the relevant Crown leases and reservations, but for an indeterminate interest in the petroleum, natural gas, and related hydrocarbons within, upon or under the lands themselves. The interest described was such an interest as would, in certain events, yield a certain percentage of net proceeds of production from such lands. This was not a specified undivided interest in a lease as contemplated by s. 176(1) (b).

It also followed that the plaintiffs were not entitled under clause 10b to obtain and market a portion of the actual production of a well.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], dismissing an appeal from a judgment of Milvain J. Appeal dismissed.

S. J. Helman, Q.C., and *R. R. Neve*, for the plaintiffs, appellants.

J. M. Robertson, Q.C., for the defendant, respondent, Bailey Selburn Oil & Gas Ltd.

The judgment of the Court was delivered by

MARTLAND J.:—By two letter-agreements dated May 18, 1951, and accepted respectively on June 28, 1951, and August 20, 1951, Seaboard Oil Company of Delaware and the British American Oil Company Limited, who were the lessees under two Crown leases, Nos. 76745 and 76746, in respect of lands located in the Buck Lake area in the Province of Alberta and who had applied to have the natural gas rights formerly comprised in Reservations Nos. 531 and 532 reserved from other disposition pending the drilling of a well on the land comprised in the leases, granted to A. G. Bailey Co. Limited and Great Plains Development Company of Canada, Ltd. the right to earn,

[1] (1962), 35 D.L.R. (2d) 574.

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Martland J.

by the drilling of a test well in accordance with the provisions of the agreement, as to each, an undivided 25 per cent interest in the leases and in any natural gas licences that could be obtained out of the reservations.

The present litigation affects only the 25 per cent interest acquired pursuant to these agreements by A. G. Bailey Co. Ltd.

On July 15, 1951, that company entered into two similar agreements, one with St. Lawrence Syndicate and the other with Theodore W. Bennett. The interest of St. Lawrence Syndicate was later acquired by St. Lawrence Petroleum Limited, one of the appellants in this case. The interest of Theodore W. Bennett was obtained by him on behalf of himself and his brother, James G. Bennett, both of whom are also appellants.

The respondent, Bailey Selburn Oil & Gas Ltd., (hereinafter referred to as "the respondent") is the assignee of A. G. Bailey Co. Limited. The other respondent, H. W. Bass & Sons, Inc., was party to an agreement with the respondent respecting the purchase from the respondent of casinghead gas, and was made a party to the litigation by the appellants only with a view to having that agreement set aside. No other relief was claimed as against it, and it was not represented on this appeal.

The case involves the interpretation of the two agreements of July 15, 1951. In each agreement A. G. Bailey Co. Limited was described as "the Company" and the other party as "the Participant" and those descriptions will be used sometimes hereafter when referring to the contents of the two agreements.

The recitals in each agreement refer to the letter-agreements of May 18, 1951, therein and hereafter referred to as "the Farm-out Agreement" and to the lands to which they relate. They also recite that:

> . . . the Participant desires to participate with the Company in the drilling of the test well and in the further development of the said lands, upon the terms and conditions hereinafter set forth;

Clause 1 of these agreements is the definition clause and in para. (*c*) defines the phrase "Net proceeds of production" as follows:

> "Net proceeds of production" as used in this agreement and in any Schedule hereto, shall with respect to any well mean the proceeds from

the sale of the Company's share of the production therefrom after deduction therefrom of the amount of all royalties and taxes payable or required to be deducted therefrom by the Company or any other person, and the Company's cost of or (as the case may be) reasonable charges for the operation of the said well, and after deducting from the balance then remaining ten percent of such balance. Provided, however, that until the Participant has received pursuant to paragraphs 5 and/or 9a hereof an amount out of the proceeds of production from such well equal to the total of the Participant's percentage of the drilling costs actually paid by the Participant the "net proceeds of production" shall be calculated without deducting the "ten percent of such balance" last above referred to. Where such well is, after being placed on production, operated by some person other than the Company, the Company's costs of the operation of such well shall include not only the Company's proportion of the operating costs, but also a reasonable fee to cover operational supervision and management of the Company's share of the production therefrom or proceeds from the sale thereof.

Clause 2 provides as follows:

The Company shall in accordance with the provisions of the Farm-out Agrement drill the test well and shall subject to the provision of the Farm-out Agrement conduct all operations, including production operations, at the test well in accordance with good oil field practice and in compliance with the laws of the Province of Alberta and regulations and orders enacted and passed thereunder by any competent body, and shall take production from the said lands to the full extent allowed by government regulations and consistent with good oil field practice and market conditions, and all of such operations shall be under the Company's exclusive management, control and direction, except as otherwise provided by the Farm-out Agreement.

Clause 3 provides that the Participant shall contribute to the drilling costs of the test well, the percentage of such costs set forth in Schedule "3" to the agreement. The relevant portions of that schedule provide:

In respect of Test Well:

Participant's percentage of net proceeds of production from test well	20%
Participant's percentage of drilling costs	20%
Amount of first contribution to drilling costs	$15,000.00

Clauses 3, 4 and 4a then go on to provide for the method of payment of the Participant's share of the costs and the consequences which arise from the failure to pay the same when required.

Clause 5 provides:

Subject to the provisions hereinbefore contained, in the event of production being obtained in the test well, the Participant shall be entitled to receive the percentage of net proceeds of production from the said well set forth in Schedule "3" hereto.

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Clause 6 provides that the Company shall be the sole judge of the character, necessity and extent of the expenses for the drilling and operating of the test well.

Clause 7 provides:

> On or before the last day of each month the Company shall render to the Participant a statement for the preceding calendar month showing all expenditures for which the Company shall have a right to reimbursement and as to which it shall not then have been reimbursed, and showing also the volume of production of petroleum and natural gas and the income from such products and their derivatives, calculated as herein provided, and the amount if any payable to the Participant for such month, together with a cheque for such amount.

Clause 8 gives to the Participant the right to examine the Company's books of account in reference to operations at the test well at intervals of not less than thirty days.

Clause 9 provides for participation by the Participant in further wells which might be drilled upon the leased lands to the extent of the percentage provided in Schedule "3".

Clause 10 gives to the Company the right to grant other rights of participation so long as they do not interfere with the rights of the Participant under the agreement.

Clause 10a provides as follows:

> If the Company shall make any disposition of any of the said lands with respect to the development of which the Participant would at time of disposition thereof have been entitled to participate pursuant to the combined operation of the provisions of paragraphs 3, 4 and 9 of this Agreement (other than a disposition pursuant to numerical paragraph 10 hereof), then the Participant shall be entitled to receive such percentage of ninety per cent of the net proceeds actually received by the Company from such disposition, as is equivalent to the Participant's "percentage of net proceeds of production" as fixed by Schedule C hereof.

Clause 10b will be recited in full later as it is the interpretation of that clause which is the main issue in these proceedings.

Clause 11 provides that the agreement should be subject to the terms and provisions of the reservations, leases, statutes and regulations applicable thereto and to the terms and provisions of the Farm-out Agreement or any more formal Farm-out Agreement substituted therefor.

Clauses 12 and 13 deal with the method of making payments under the agreement by the Company to the Participant.

The subsequent clauses of the agreements are not relevant to the issue in this appeal.

I now revert to clause 10b which provides as follows:

> Subject to the underlying Agreements and subject to the obtaining of any required consent, the Company hereby assigns to the Participant such an undivided interest in the petroleum and natural gas and related hydrocarbons other than coal within upon or under the said lands as will, upon the said lands being operated by the Company and the production therefrom being sold all as in this Agreement provided yield to the Participant the percentage of net proceeds of production as herein defined specified in numerical paragraph 5 hereof. The Company agrees to hold its interest in the said petroleum natural gas and related hydrocarbons in trust for the purposes of this Agreement and the Participant agrees to reassign to the Company from time to time all or such portion of the Participant's said undivided interest as may be necessary to revest such interest in the Company insofar as the same relates to any portion of the said lands in which the Participant ceases by virtue of numerical clause 4 or 9 hereof, to be entitled to a share in the net proceeds of the production therefrom.

It is the contention of the appellants that this clause gives to them an assignable interest in the lands defined in the agreements, capable of registration, and with a right to receive and sell their share of production from the lands. They brought this action to obtain a declaration to that effect. The position of the respondent is that under clause 10b the appellants acquired no more than a limited equitable interest, by way of charge, to secure to them the money payments to which, as a matter of contract, they might become entitled under the provisions of the agreements. The respondent contends that the appellants' participation in production from the lands is limited to the receipt of the prescribed portion of the proceeds of sale of production by the respondent.

The learned trial judge agreed with the respondent and dismissed the action. At the trial the appellants, contending that the provisions of clause 10b were ambiguous, tendered, subject to objection, extrinsic evidence to support their interpretation of it. The learned trial judge held this evidence to be inadmissible, but went on to hold that even if it had been admissible, his decision would have been the same.

The appellants appealed to the Appellate Division of the Supreme Court of Alberta. Their appeal was dismissed by a unanimous decision of that Court. It is from that judgment that the present appeal is brought.

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At the conclusion of the argument by counsel for the appellants, counsel for the respondent was advised that it would not be necessary for him to deal with the issue of the admissibility of the extrinsic evidence. This Court agreed with the view of both the Courts below that clause 10b, while presenting difficulties of interpretation, was not ambiguous and that the evidence was inadmissible. Counsel for the respondent was also advised that he would not have to argue the question of equitable estoppel which had been raised in the pleadings by the appellants' reply.

The sole issue remaining, therefore, is as to the meaning and effect of clause 10b.

I have reviewed the contents of the two agreements of July 15, 1951, in some detail because clause 10b must be considered in relation to and as a part of each agreement considered as a whole. The essence of each agreement is that, by participating in the cost of drilling a producing well upon the lands in question to the extent of the stipulated percentage of cost, the Participant would become entitled to receive the stipulated percenage of the net proceeds of production of such well. "Net proceeds of production" as defined clearly refers to an amount of money. They are the proceeds from the sale of the Company's share of the production from the well after making those deductions which are provided for in clause 1(*c*). The Company's share of production referred to in this para. (*c*), is, obviously, the 25 per cent interest in production which it could earn under the terms of the Farm-out Agreement. The appellants are, therefore, entitled, as a matter of contract, to a percentage of certain monies to be obtained from the sale of the production from any well in respect of whose drilling costs they have contributed their required portions.

The Company, under clause 2, is to conduct all operations regarding the well, save as otherwise provided in the Farm-out Agreement, and it is to take the production from the lands to the full extent permitted by Government regulations, good oil field practice and market conditions.

Clause 7 provides for the furnishing of monthly statements by the Company to the Participant showing income from the products and their derivatives, the amount payable to the Participant for such month, together with a cheque for such amount.

Clause 10a enables the Company to dispose of lands in respect of which the Participant would have had a right of participation upon payment to the Participant of the stipulated percentage of 90 per cent of the net proceeds of such sale.

All of these provisions are consistent only with the Company being in complete control of its interest in the lands acquired pursuant to the Farm-out Agreement, with a right in the Participant only to share in the money proceeds obtained either from the sale of the products by the Company or from the sale by the Company of the lands themselves.

It is against this background that clause 10b must be interpreted. Under its provisions the Company presently assigns *such* an interest in the petroleum, natural gas and related hydrocarbons other than coal within, upon or under the lands in question as *will,* after production is obtained by the Company's operations and sold, yield to the Participant his percentage of the net proceeds of production from the lands. In my opinion this clause says that the Participant is to have an interest in the petroleum, natural gas and related hydrocarbons equivalent to the percentage of monies constituting the net proceeds of production which he is entitled to receive under the agreement. The purpose of the clause is apparently to provide that the monies to which the Participant becomes entitled under the agreement represent the proceeds of the sale of products in which he has an equivalent interest.

The interest created by this clause, however it may be defined, is only an equitable interest, because the clause goes on to provide that the Company shall hold its interest in the petroleum, natural gas and related hydrocarbons in trust for the purposes of the agreement.

I would, therefore, construe the clause as doing no more than to make the respondent a trustee of the interest which it acquired under the Farm-out Agreement for the purposes of these agreements and to make the appellants beneficiaries in respect of equitable interests which should be equivalent to their shares of the money proceeds of the sale of production.

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I agree with the conclusion stated by the learned trial judge in the following terms:

> I cannot see that the parties contemplated or agreed to the Participant becoming owner of a fractional interest in the said lands capable of assignment and registration. Had it been intended to convey such an interest it would have been a very simple thing to do in plain and unmistakable words. The effect of Clause 10b cannot do more than confer some intangible equitable interest in the lands occupied by a producing well in which the Participant has participated.

The appellants have not obtained, by virtue of clause 10b, an undivided interest in land capable of assignment by itself. It is an interest which is tied to an interest in the monies to be derived from the sale of production; an interest which will yield a certain percentage of a part of the income from each producing well in which the Participant has participated. In my opinion it would be capable of assignment only as a part of an assignment by the appellants of their interest in the agreements themselves.

The appellants' interest could not be registered under *The Mines and Minerals Act, 1962,* (Alta.), c. 49.

Section 176(1) of that Act permits the registration of a transfer with respect to an agreement in these terms:

> 176. (1) A transfer with respect to an agreement that the lessee is not prohibited from transferring or agreeing to transfer by any provision of this Act or any regulation or by the terms of the agreement, may be registered by the Minister if the transfer conveys
>
> (*a*) the whole of the agreement,
>
> (*b*) a specified undivided interest in the agreement, or
>
> (*c*) a part of the location contained in the agreement.

"Agreement" is defined in s. 2(1)(*a*) as follows:

> "Agreement" means any lease, licence, reservation, permit or other agreement made or entered into under
>
> (i) this Act or the former Act, or
>
> (ii) The Provincial Lands Act or the Dominion Lands Act and relating to a mineral,
>
> but does not include a unit agreement under Part VIII;

Clause 10b does not provide for a specified undivided interest in the relevant Crown leases or reservations, but for an indeterminate interest in the petroleum, natural gas, and related hydrocarbons within, upon or under the lands themselves. The interest described is such an interest as will, in certain events, yield a certain percentage of net proceeds of production from such lands. This, in my view, is cer-

tainly not a specified undivided interest in a lease as contemplated by s. 176(1)(*b*).

Finally it also follows that the appellants are not entitled under clause 10b to obtain and market a portion of the actual production of a well. The intention of the whole agreement, including clause 10b, is that the operation of each well and the production and marketing of its products is to be under the sole control of the respondent.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Helman, Fleming & Neve, Calgary.

Solicitors for the defendant, respondent, Bailey Selburn Oil & Gas Ltd.: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

RUSSELL TAYLOR .....RESPONDENT.

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*Jun. 3
Jun. 24

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Criminal negligence causing death—Motor vehicle—Jury trial—Lack of evidence—Insufficiency of evidence—Question of law.

The respondent was found guilty of criminal negligence causing death. The evidence relating to the accident itself was given by one witness who testified that a car going about 70 m.p.h. overtook her own car and cut suddenly in front of her. The right side of the car appeared to rise from the ground and then the car veered to the left side of the road and continued on. The place where this observation occurred was the place where the body of a nine-year old boy was found in the ditch the following morning. The respondent denied any knowledge of the accident and sought to show that neither he nor his automobile had anything to do with it. Debris found at the scene connected his car with the accident. Subsequent to the accident, the respondent kept his car in his garage for two or three days, which was unusual for him to do. Then four days later, he drove to Oshawa during the night and had his car repaired. The Court of Appeal

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Judson JJ.

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quashed the conviction. The Crown was granted leave to appeal to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed and the conviction restored.

Per Taschereau C.J. and Fauteux, Abbott and Judson JJ.: It was a common basis to both sets of reasons for judgment in the Court below that there was no evidence to go to the jury. This was a question of law and it was erroneously decided by that Court. In addition to the witness's description of the driving, there was the subsequent conduct of the respondent which was of real significance when linked with the driving. All this was properly before the jury, so that there was evidence of criminal negligence to go to the jury. *Balcerczyk v. The Queen*, [1957] S.C.R. 20, referred to.

Per Cartwright J., *dissenting:* A reading of the reasons for judgment of Casey J., with which Badeaux J. concurred, where he used the very words of clause (i) of s. 592(1)(a) of the Criminal Code, after which he went on to hold that guilt could not be "reasonably deduced" from the evidence, forces the conclusion that the Judge based his judgment on the insufficiency of the evidence rather than the lack of it. It is well settled that if one of the grounds on which a Court of Appeal quashes a conviction is that it cannot be supported by the evidence this Court is without jurisdiction even though the judgment is also based on other grounds raising questions of law in the strict sense. *The Queen v. Warner*, [1961] S.C.R. 144, referred to.

APPEAL by the Crown from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], quashing the respondent's conviction. Appeal allowed, Cartwright J. dissenting.

Yvan Mignault, for the appellant.

Lawrence Corriveau, Q.C., for the respondent.

The judgment of Taschereau C.J. and of Fauteux, Abbott and Judson JJ. was delivered by

JUDSON J.:—The conviction of the respondent Russell Taylor on a charge of criminal negligence causing death was set aside by a judgment of the Court of Queen's Bench, Appeal Side[1], from which judgment the Crown now appeals by leave of this Court.

The evidence relating to the accident itself was brief and given by only one witness. She was Madame Léonard Lemieux, who was driving north on Boulevard Henri Bourassa on April 5, 1960, between 7 and 7:15 in the evening. She says that a car overtook her and cut suddenly

[1] [1963] Q.B. 96.

in front of her. She thought it was going to strike a power pole on the side of the road. The right-hand side of the car appeared to rise from the ground and then the car veered suddenly to the left-hand side of the road and from there went on its way to the north. It did not stop. She estimates its speed at 70 miles an hour. She says she herself was going at 40 miles an hour. The place where this observation occurred was the place where the body of Marcel Berthiaume, a boy of 9 years of age, was found in the ditch the following morning. The boy had left his house in the early evening of April 5 to go on an errand for his mother.

Taylor's defence was that he had nothing to do with the accident; that he was not at the scene of the accident at the hour in question but was at home with his car in the garage; and that at no relevant time had he given his car into the possession of any other person. This defence could not succeed against the evidence adduced by the prosecution. Debris from a car which was found at the scene of the accident connects Taylor's car with the accident beyond any doubt. Taylor's conduct after April 5, 1960, is also significant. He kept his car in the garage for two or three days with the doors closed. This was an unusual thing to do and was noted by his neighbours at Lac Beauport. On April 9, four days after the accident, he left Lac Beauport at 9 p.m. and drove to Oshawa during the night. He had the car repaired in Oshawa and the explanation he gave for this trip could not possibly be accepted by the jury.

When the case came to appeal the Court concentrated its attention upon the evidence of Madame Lemieux. I take the finding of Casey J. to be that there was no evidence to go to the jury and that, in consequence, he held that the verdict was unreasonable and could not be supported by the evidence. Rinfret J. held that the learned trial judge ought to have directed a verdict of acquittal. Badeaux J. agreed with both his colleagues and, in my opinion, without any inconsistency for it is a common basis to both reasons for judgment that there was no evidence to go to the jury. This is a question of law and I am of the opinion that the ruling upon it was erroneous.

Even if the attention of a Court is limited entirely to Madame Lemieux's description of the driving, I cannot agree that there was no evidence of criminal negligence to

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Judson J.

go to the jury. There was, in addition, Taylor's subsequent conduct which is of real significance when linked with the driving. All this was properly before the jury. *Balcerczyk v. The Queen*[1].

I would set aside the judgment of the Court of Queen's Bench, Appeal Side, and restore the jury's verdict of guilty. I note from the record that the accused has already been sentenced.

CARTWRIGHT J. (*dissenting*):—This is an appeal brought by the Crown, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Queen's Bench, Appeal Side[2], quashing the conviction of the respondent on a charge of criminal negligence.

On April 5, 1960, Marcel Berthiaume died as a result of having been struck by an automobile. It was the theory of the Crown that the respondent was the owner and driver of the car which struck the deceased. The defence was a denial that this was so. The respondent sought to show that neither he nor his automobile had anything to do with the accident.

The Court of Queen's Bench was composed of Casey, Rinfret and Badeaux JJ. Casey J. and Rinfret J. each delivered written reasons and Badeaux J. agreed with both of them.

The appeal is met *in limine* by the submission of counsel for the respondent that we are without jurisdiction as the judgment sought to be appealed was based on the ground that the conviction was unreasonable or could not be supported by the evidence and that the appeal raises no question of law in the strict sense.

In my opinion this submission is entitled to prevail.

The question whether there is any evidence (as distinguished from sufficient evidence) to support a verdict is a question of law. The answer to the question whether Casey J. decided that as a matter of law there was no evidence or that the evidence was insufficient depends on the construction of the words used by that learned Judge.

After a review of portions of the evidence, Casey J. says:

> It was the burden of the Crown to prove that the victim had been struck by appellant's car, that appellant had been driving the automobile

[1] [1957] S.C.R. 20, 117 C.C.C. 71. [2] [1963] Que. Q.B. 96.

and that (CC 191) in his driving he had shown 'wanton or reckless disregard for the lives or safety of other persons'.

Before a jury can be called upon to pass judgment, before it can be asked to decide whether there was 'wanton or reckless disregard' there must be some evidence from which the existence of this element can be reasonably deduced. If no such evidence exists then the verdict that finds the accused guilty is one that in the words of CC 592 is 'unreasonable or cannot be supported by the evidence'. In this case the only person who testifies as to the conduct of the appellant was Mrs. Lemieux. Assuming that the appellant was driving the automobile that struck the victim the evidence of Mrs. Lemieux does not establish facts from which the existence of 'wanton or reckless disregard' can be reasonably deduced.

For the foregoing reasons I would maintain this appeal and quash the conviction.

It will be observed that the learned Judge used the very words of clause (i) of s. 592(1)(*a*) of the *Criminal Code* which must be contrasted with clause (ii). The section reads in part:

592(1) On the hearing of an appeal against a conviction, the court of appeal

(*a*) may allow the appeal where it is of opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

Casey J. goes on to hold that guilt cannot be "reasonably deduced" from the evidence.

I have reached the conclusion that Casey J. based his judgment on clause (i) quoted above and not on clause (ii). It has already been pointed out that Badeaux J. agreed with Casey J.

It is settled by the judgment of this Court in *The Queen v. Warner*[1], that if one of the grounds on which a Court of Appeal quashes a conviction is that it cannot be supported by the evidence we are without jurisdiction even although the judgment is also based on other grounds raising questions of law in the strict sense.

For these reasons I have reached the conclusion that we are without jurisdiction to interfere with the judgment of

[1] [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

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the Court of Queen's Bench, Appeal Side, in this case, and I would dismiss the appeal.

Appeal allowed, CARTWRIGHT J. *dissenting.*

Attorney for the appellant: Jean Bienvenu, Quebec.

Attorney for the respondent: Lawrence Corriveau, Quebec.

1962

*Nov. 9

1963

Jan. 22

HENRI ROTONDO .....APPELANT;

ET

SA MAJESTE LA REINE .....INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC.

Droit criminel—Possession d'un objet volé—Preuve de possession au sens de l'art. 296 du Code Criminel.

L'appelant fut trouvé coupable d'avoir eu en sa possession un radio d'automobile sachant qu'il avait été volé. Ce radio fut volé par un nommé Corbin qui le cacha dans le bas de la ville de Montréal. Quelques heures plus tard, dans la soirée, Corbin et deux autres personnes prirent place dans le nord de la ville dans l'automobile de l'appelant qui était accompagné d'un nommé Whitworth. Ils descendirent vers le bas de la ville pour s'arrêter dans le voisinage de l'endroit où Corbin avait caché le radio. A ce moment ou quelques instants auparavant Corbin informa l'appelant qu'il avait quelque chose à lui donner. Corbin alla chercher le radio et le rapporta en le cachant sous son manteau. Après avoir laissé Corbin et ses deux compagnons en cours de route, l'appelant conduisit Whitworth à un endroit où celui-ci cacha le radio. L'appelant témoigna qu'au cours de la randonnée il avait déclaré: «Moi je veux rien avoir avec ça».

La Cour d'Appel, par un jugement majoritaire, rejeta l'appel. Le juge dissident jugea qu'il n'avait pas été établi que l'appelant avait eu la possession physique ou le contrôle du radio. L'appelant a obtenu permission d'appeler devant cette Cour sur la question de savoir s'il y avait au dossier une preuve légale justifiant la conclusion qu'il y avait eu possession au sens de l'art. 296 du *Code Criminel.*

Arrêt: L'appel doit être rejeté.

L'ensemble de la preuve établit raisonnablement que le juge au procès pouvait judicieusement conclure—comme il le fit—que l'appelant savait que l'objet dont Corbin lui fit don était le radio, qu'il savait qu'il s'agissait d'un objet volé, et qu'il en avait eu, au moins pour un temps appréciable, la possession. Si la déclaration de l'appelant, rapportée dans son témoignage, permettait au juge de déduire qu'il savait alors

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*CORAM: Les Juges Taschereau, Fauteux, Martland, Judson et Ritchie.

qu'il s'agissait d'un objet volé, le juge était libre de croire ou de ne pas croire que l'appelant avait véritablement fait cette déclaration. Au regard des arts. 3(4) et 300 du Code et du dossier, rien ne permet d'écarter validement la déclaration de culpabilité.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant le verdict de culpabilité prononcé contre l'appelant. Appel rejeté.

N. Losier, pour l'appelant.

J. Bellemare, pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Accusé d'avoir à Montréal, le 30 mars 1961, (i) volé un radio d'automobile, d'une valeur de $135, et (ii) eu en sa possession ce radio, sachant qu'il était volé, l'appelant, à l'issue du procès, fut acquitté du vol et trouvé coupable de recel.

Il appela de cette condamnation à la Cour du banc de la reine[1] siégeant en appel, où il soutint en somme que les éléments du recel n'avaient pas été légalement prouvés. Cette prétention fut rejetée comme non fondée par MM. les Juges Taschereau et Owen, formant la majorité. M. le Juge Bissonnette, dissident, fut d'avis qu'il n'était pas établi que l'accusé avait eu la possession physique ou le contrôle du radio. L'appel fut rejeté.

Dans un pourvoi subséquent à cette Cour, l'appelant invoqua la dissidence prononcée en Cour d'Appel et soumit particulièrement, comme grief d'appel, suivant la permission d'appeler par lui obtenue, qu'il n'y a au dossier aucune preuve légale justifiant la Cour de conclure que l'appelant a eu la possession de ce radio au sens de l'art. 296 du *Code Criminel* sous lequel il avait été accusé.

Les témoins entendus sur les circonstances précédant et accompagnant le fait reproché à l'appelant sont tous plus ou moins impliqués en l'affaire. Leurs témoignages, non dépourvus de réticences ou de contradictions, permettent d'en faire ce résumé.

Dans l'après-midi du 30 mars 1961, Fernand Corbin vola le radio en question alors qu'il était fixé à une automobile stationnée dans le bas de la ville en arrière d'un immeuble

[1] [1962] B.R. 653.

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Fauteux J.

de la rue St-Denis, près de la rue Notre-Dame-de-Lourdes, véhicule qu'il avait illégalement déplacé aux fins de ce vol. Il cacha le radio dans une cour privée attenante à la rue Notre-Dame-de-Lourdes et dont l'accès était protégé par une clôture. Le même jour, vers les neuf heures du soir, Corbin, Marcel Plante et Charles Vincent, se trouvant alors dans le nord de la ville, prirent place dans une automobile conduite par l'appelant, en compagnie duquel se trouvait déjà Wayne Whitworth. Tous ces occupants de la voiture, à l'exception de Rotondo qui était âgé de près de quarante ans, étaient des jeunes gens de quinze à dix-neuf ans. Ils descendirent tous vers le bas de la ville pour s'arrêter dans le voisinage immédiat de l'endroit où Corbin avait caché le radio. C'est alors que Corbin, muni d'outils, se rendit dans la cour privée, prit le radio et le rapporta à l'automobile en le cachant sous son manteau. Repartis de cet endroit, les occupants de la voiture, à l'exception de Rotondo et Wayne Whitworth, se firent laisser à une salle de pool et Rotondo conduisit Whitworth à un endroit où celui-ci cacha le radio. A un certain moment, avant ou au moment d'arriver à la cour privée, Corbin informa Rotondo qu'il avait quelque chose à lui donner. Il ne fait aucun doute, suivant la preuve, que ce quelque chose était le radio que Corbin avait rapporté à l'automobile avec ses outils, au vu de certains sinon de tous les occupants de la voiture. Sans entrer dans le détail et la discussion des témoignages rendus par ces jeunes gens et l'appelant, l'ensemble de la preuve faite par ces témoins, dont la tenue en Cour aussi bien que les témoignages ont pu être appréciés par le Juge au procès, établit raisonnablement que ce dernier pouvait judicieusement conclure—comme il le fit—que l'appelant savait que l'objet dont Corbin lui fit don était le radio, qu'il savait qu'il s'agissait d'un objet volé, et enfin qu'il en avait eu, au moins pour un temps appréciable, la possession. Entendu comme témoin, pour sa propre défense, Rotondo admit avoir déjà été condamné pour vol avec effraction et recel. Il témoigna qu'à un moment, au cours de cette randonnée en automobile, il avait déclaré:—«Moi je veux rien avoir à faire avec ça». Si cette déclaration, rapportée dans son témoignage, permettait au Juge de déduire que Rotondo savait alors qu'il s'agissait d'un objet volé, le Juge était libre de croire ou de ne pas croire que Rotondo avait véritablement fait cette déclaration au cours

de l'affaire. La section 4 de l'art. 3 du *Code Criminel* définit ainsi la possession:

> Aux fins de la présente loi,
>
> *a*) Une personne est en possession d'une chose lorsqu'elle l'a en sa possession personnelle ou que, sciemment,
>
> (i) elle l'a en la possession ou garde réelle d'une autre personne, ou
>
> (ii) elle l'a en un lieu qui lui appartient ou non ou qu'elle occupe ou non, pour son propre usage ou avantage ou celui d'une autre personne; et
>
> *b*) Lorsqu'une de deux ou plusieurs personnes, au su et avec le consentement de l'autre ou des autres, a une chose en sa garde ou possession, cette chose est censée sous la garde et en la possession de toutes ces personnes et de chacune d'elles.

Et l'article 300 édicte:

> Pour l'application de l'article 296 et de l'alinéa *b*) du paragraphe (1) de l'article 298, l'infraction consistant à avoir en sa possession est consommée lorsqu'une personne a, seule ou conjointement avec une autre, la possession ou le contrôle d'une chose mentionnée dans ces articles ou lorsqu'elle aide à la cacher ou à en disposer, selon le cas.

Ayant attentivement considéré la preuve et tous les moyens de droit soulevés de la part de l'appelant, je dirais qu'au regard de la loi et du dossier, rien ne permet d'écarter validement la déclaration de culpabilité prononcée contre l'appelant en première instance et confirmée par le jugement de la Cour du Banc de la Reine siégeant en appel.

Je renverrais l'appel.

Appel rejeté.

Procureur de l'appelant: Norbert Losier, Montréal.

Procureur de l'intimée: Michael Franklin, Montréal.

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*Jan. 31, Feb. 1, 6, 7, 8, 9 Mar. 22

D. HUBERT COX .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND

HUGH PATON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Counts of conspiracy to defraud and conspiracy to steal involving six separate transactions—Whether count of conspiracy to defraud bad as being contrary to s. 492(1), Criminal Code—Whether facts that jury returned verdict of guilty on both counts and that this verdict was recorded fatal to maintenance of either conviction—Charge of making, circulating or publishing false prospectus—Criminal Code, 1953-54 (Can.), c. 51, ss. 322(1), 343(1), 492, 497, 500(1)(a), 592.

The two accused obtained control of B P Ltd. Their net outlay for the acquisition of such control was nil. They so arranged the transaction and so manipulated matters that the moneys invested by bondholders in B P Ltd. became the source of the funds wherewith the accused purchased shares and acquired control of the company. In an indictment containing five counts the accused were charged, *inter alia*, with conspiring to steal and conspiring to defraud B P Ltd. of approximately $460,000, and that they did "unlawfully make, circulate or publish" a false prospectus "with intent to induce members of the public to advance monies to Brandon Packers Limited". They were convicted at trial on all five counts. The Court of Appeal for Manitoba, the Chief Justice dissenting, affirmed the convictions for conspiracy to defraud and issuing a false prospectus, but unanimously quashed the other convictions, including that for conspiracy to steal. The accused appealed to this Court from the convictions for conspiracy to defraud and issuing a false prospectus.

Held: The appeals should be dismissed.

The conspiracy to defraud count charged a single conspiracy, existing over a considerable period of time, the object of which was to defraud B P Ltd. of large sums of money by such fraudulent means as presented themselves from time to time. It was not necessary to decide whether each of the six transactions referred to in the particulars was in itself an indictable offence separate from the other five or whether the evidence proved in regard to every one of these items that a crime was actually committed. What the count alleged was that they were all planned in the course of carrying out the single conspiracy and there was evidence to justify the jury in so finding. It was the guilty agreement and not the several acts done in pursuance thereof which constituted the offence charged.

*PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

It was sufficient to consider the first of the six transactions set out in the particulars. This transaction constituted an offence under s. 323(1) of the Criminal Code and there was ample evidence on which the jury could find the accused guilty of conspiracy to defraud as charged.

The convictions for conspiracy to steal and conspiracy to defraud could not both be supported, not because they were mutually destructive, but because if both were allowed to stand the accused would in reality be convicted twice of the same offence. It was the same conspiracy which was alleged in the two counts and it would be contrary to law that the accused should be punished more than once for the same offence. The Court of Appeal had power under Part XVIII of the *Criminal Code*, particularly s. 592(1)(b)(i) and 592(3), to decide that the conviction on the conspiracy to steal count should be quashed and that on the conspiracy to defraud count should be affirmed.

Section 343(1)(c) creates only one offence, the essence of which is an attempt to induce persons to advance moneys to a company by means of a prospectus known to the accused to be false in a material particular. The making, circulating or publishing of such a prospectus are not separate offences, but are modes in which the one offence may be committed. A prospectus may be "false in a material particular" within the meaning of s. 343(1) if it contains a material statement as to the purpose for which the proceeds from the sale of the securities offered in the prospectus are to be used and it is found that the person making the statement had never any intention that the proceeds should be used for that purpose. The test is not whether the statement amounted strictly speaking to a "false pretence" but rather whether the conduct of the accused in making it was fraudulent. The expression "any person" includes all persons of the class to whom the prospectus was intended to be given although at the time the false prospectus was made the identity of none of these persons was known.

R. v. Carswell (1916), 10 W.W.R. 1027; *Archer v. The Queen*, [1955] S.C.R. 33, referred to; *Heinze et al v. State* (1945), 42 A. (2d) 128; *R. v. Mills*, [1959] Criminal Case and Comment 188; *Kelly v. The King* (1916), 54 S.C.R. 220; *R. v. Ingram*, [1956] 2 All E.R. 639, considered; *R. v. Dent*, [1955] 2 Q.B. 590, distinguished; *R. v. Graham* (1954), 18 C.R. 110; *R. v. Rose* (1946), 3 C.R. 277, approved.

APPEALS from decision of the Court of Appeal for Manitoba dismissing appeals by accused against their convictions by Monnin J. and jury on charges of conspiracy to defraud, contrary to s. 323(1), *Criminal Code*, and publishing a false prospectus, contrary to s. 343(1)(*c*). Appeals dismissed.

H. Monk, Q.C., for the appellant Cox.

H. Walsh, Q.C., and *J. J. Robinette, Q.C.*, for the appellant Paton.

A. S. Dewar, Q.C., and *K. G. Houston*, for the respondent.

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COX AND PATON v. THE QUEEN

The judgment of the Court was delivered by

CARTWRIGHT J.:—The appellants Hugh Paton and D. Hubert Cox were tried before Monnin J. and a jury on an indictment containing the following five counts:

1. That they the said Hugh Paton and D. Hubert Cox between the first day of January in the year of our Lord one thousand nine hundred and fifty-six and the thirtieth day of November in the year of our Lord one thousand nine hundred and sixty both days inclusive, at the City of Brandon, in the Province of Manitoba, did unlawfully conspire together each with the other to commit an indictable offence, to wit: to steal the monies, valuable securities or other property of Brandon Packers Limited to the value of approximately Four hundred and sixty thousand ($460,000.00) Dollars.

2. That they the said Hugh Paton and D. Hubert Cox between the first day of November in the year of our Lord one thousand nine hundred and fifty-six and the thirtieth day of November in the year of our Lord one thousand nine hundred and sixty both days inclusive, at the City of Brandon, in the Province of Manitoba, did unlawfully steal the monies, valuable securities or other property of Brandon Packers Limited to the value of approximately Four hundred and forty-eight thousand ($448,000.00) Dollars.

3. That they the said Hugh Paton and D. Hubert Cox between the first day of January in the year of our Lord one thousand nine hundred and fifty-six and the thirtieth day of November in the year of our Lord one thousand nine hundred and sixty both days inclusive, at the City of Brandon, in the Province of Manitoba, did unlawfully conspire together each with the other to commit an indictable offence, to wit: by deceit, falsehood or other fraudulent means to defraud Brandon Packers Limited of monies, valuable securities or other property to the value of approximately Four Hundred and sixty thousand ($460,000.00) Dollars.

4. That they the said Hugh Paton and D. Hubert Cox between the first day of November in the year of our Lord one thousand nine hundred and fifty-six and the thirtieth day of November in the year of our Lord one thousand nine hundred and sixty both days inclusive, at the City of Brandon, in the Province of Manitoba, by deceit, falsehood or other fraudulent means, defrauded Brandon Packers Limited of monies, valuable securities or other property to the value of approximately Four hundred and forty-eight thousand ($448,000.00) Dollars.

5. That they the said Hugh Paton and D. Hubert Cox between the first day of June in the year of our Lord one thousand nine hundred and fifty-six and the first day of June in the year of our Lord one thousand nine hundred and fifty-seven both days inclusive, at the City of Brandon, in the Province of Manitoba, did unlawfully make, circulate or publish a prospectus dated July 14th, 1956 for a four hundred thousand ($400,000.00) Dollar issue of five and one-half (5½%) per centum sinking fund bonds of Brandon Packers Limited, they the said Hugh Paton and D. Hubert Cox knowing the said prospectus to be false in a material particular with intent to induce members of the public to advance monies to Brandon Packers Limited. . .

Before the accused had pleaded to the indictment their counsel moved to quash count 3 on the ground that it was

void for uncertainty and to quash count 5 on the ground that it disclosed no offence known to the law since it did not charge an intent to induce an ascertained person or ascertained persons to advance moneys but charged an intent to induce "members of the public" to advance moneys. Both of these motions were dismissed by the learned trial judge.

In the course of the argument of these motions, which took place in the absence of the members of the jury panel and before the jury had been selected, counsel for the Crown stated that counts 3 and 4 were "in effect alternative charges to counts 1 and 2"; but this was not at any stage of the trial pointed out to the jury.

No order, such as is contemplated by s. 497 of the *Criminal Code,* that the prosecutor should furnish particulars was made; but it appears from the transcript of the argument on the motions referred to above that counsel for the Crown had orally given particulars at the preliminary inquiry and these he repeated in his opening address to the jury at the trial. The particulars stated that the amount of "approximately $460,000" referred to in counts 1 and 3 was made up as follows:

1. Investment by Brandon Packers Limited preferred shares of Fropak Limited;	$200,000.00
2. Reimbursement to the accused for out-of-pocket expenses;	4,219.41
3. Payment for office space and services in Toronto;	8,000.00
4. Payment of real estate agent's commission in respect of purchase of plant at Lakehead;	4,000.00
5. Management fees;	208,750.00
6. Loans to companies controlled by accused. ..	38,500.00
	$463,469.41

The particulars also stated that the amount of "approximately $448,000" referred to in counts 2 and 4 was made up of the same six items except that in the case of the management fees, item 5, the amount actually collected from Brandon Packers Limited was $196,715.24.

At the end of the case for the Crown, counsel for the appellants moved to quash counts 1 and 3 on the ground that the evidence disclosed that each of them applied to at least six separate and distinct transactions and not a single transaction. The motion was denied.

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Cartwright J.

Towards the end of his charge to the jury the learned trial judge instructed them that they might find a verdict of guilty or not guilty on each of the five counts.

At the conclusion of the charge counsel for the accused made the submission, amongst others, that counts 1 and 2 were alternatives to counts 3 and 4 and that the jury should be instructed that they could not convict on both count 1 and count 3 or on both count 2 and count 4. Counsel for the Crown opposed this submission and the learned trial judge did not give the direction asked for.

The jury returned a verdict of guilty against each of the appellants on all five counts. The learned trial judge imposed sentences of seven years imprisonment on each count, the sentences to run concurrently.

The appellants appealed to the Court of Appeal for Manitoba. The appeals were heard by a Court composed of Miller C.J.M., Schultz, Freedman and Guy JJ.A. and Bastin J. (*ad hoc*). The Court unanimously decided that counts 1, 2 and 4 should be quashed and that a verdict of acquittal should be entered on each of them. The majority of the Court (Miller C.J.M., dissenting) dismissed the appeals against the convictions on counts 3 and 5; the sentences were reduced to imprisonment for four years on each of these counts, the sentences to run concurrently.

Miller C.J.M. dissenting as to counts 3 and 5 would have quashed the convictions and directed verdicts of acquittal to be entered on both of these counts.

In the formal judgment of the Court of Appeal it is recited that the Chief Justice dissented "on the following grounds in law":

1. That Count 5 in the Indictment is void for uncertainty in that it charges more than one offence, namely, three separate offences of making, circulating or publishing a false prospectus which form of charge in a single count in the Indictment is prohibited by section 492 of the *Criminal Code*.

2. That the learned trial Judge erred in failing to direct the jury to bring in a verdict of acquittal on Count 5 in the Indictment when an application for a directed verdict was made by defence counsel at the close of the evidence for the Crown since there was absolutely no evidence adduced that the Appellants made, published or circulated a prospectus, or that the prospectus was false in a material particular to the knowledge of the Appellants.

3. That there was no evidence adduced at the trial that the Appellants made, published, or circulated a prospectus.

4. That there was no evidence adduced that the prospectus was false in a material particular to the knowledge of the Appellants.

5. That the verdict of guilty by the jury on Count 5 in the Indictment was perverse.

6. That Count 3 in the Indictment while alleging a single transaction involved six separate and distinct transactions and that the learned trial Judge erred in failing to quash the said Count 3 or direct the jury to bring in a verdict of acquittal thereon.

7. That the learned trial Judge erred in directing the jury that they could consider the charging of management fees by Great West Saddlery Company Limited to Brandon Packers Limited in the sum of $208,750.00 as indicating a conspiracy to defraud on the part of the Appellants, when there was no evidence of fraud with respect to the said management fees and when the charging and collection of the said management fees did not amount to a crime.

8. That the verdict of the jury was inconsistent and uncertain in bringing in a verdict of guilty on both Counts 1 and 3 in the Indictment when these were alternative Counts, each containing six separate transactions and that the verdict of the jury was therefore confusing and uncertain in that it could not be ascertained on which item or items the jury had based its finding.

9. That the verdict of the jury was inconsistent and uncertain and could not be allowed to stand as a conviction on Counts 1 or 3 in the Indictment since it could not be said that the jury convicted the Appellants either of conspiracy to steal or conspiracy to defraud, in connection with the item of $200,000.00 referred to in the particulars of the Counts supplied by the Crown.

10. Counts 1 and 3 in the Indictment each related to more than a single transaction and as a result the verdict of the jury was ambiguous, inconsistent and improper in that no one knows upon which of the various transactions the jury convicted and upon which of the various transactions the jury acquitted.

11. Since the jury by its verdict in Counts 1 and 3 found that each Count contained more than a single transaction, some being theft and some fraud, and this being contrary to Section 492 of the *Criminal Code* all of the said Counts 1 and 3 must be quashed.

12. The verdict of guilty brought in by the jury on both Counts 1 and 3 in the Indictment is fatal to the maintenance of both convictions.

By orders of this Court made on October 29, 1962, leave was granted to both of the accused to appeal from the judgment of the Court of Appeal on the following ground:

Does Count 5 in the indictment disclose any offence known to our law since it does not charge that the appellants published a prospectus with intent to induce an ascertained person or ascertained persons to advance monies but charges an intent 'to induce members of the public to advance monies'.

The notices of appeal to this Court served by both of the accused were founded on the ground on which leave was granted and on

the grounds in law set forth by Miller C.J.M. in his dissent from the judgment of the said Court of Appeal which said grounds of dissent in

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law are more particularly set out in the reasons for judgment of the said Miller C.J.M. and in the certificate of judgment of the said Court of Appeal.

By orders of this Court made on October 29, 1962, leave was granted to the Attorney-General of the Province of Manitoba to appeal from the judgment of the Court of Appeal, in so far as it quashed the conviction on count 4. The grounds upon which this leave was granted in the case of each accused were:

> 1. Did the Court of Appeal err in holding that there were six separate and distinct transactions involved in the offence set forth in count 4 of the indictment?
>
> 2. Did the Court of Appeal err in holding that count 4 in the indictment offended against subsection (1) of section 492 of the Criminal Code in that it did not in general apply to a single transaction?
>
> 3. Did the Court of Appeal err in not affirming the conviction on count 4 in the indictment when it was satisfied that the evidence disclosed that the respondent had by deceit, falsehood or other fraudulent means, defrauded Brandon Packers Limited of monies, valuable securities and other property?

At the conclusion of the argument in this Court counsel for the Crown stated, in answer to a question from the bench, that in the event of the appeals of the accused as to either count 3 or count 5 being dismissed he did not wish to press the appeals of the Crown as to count 4.

In the course of the trial which occupied thirty-nine days more than six hundred exhibits were filed. The lengthy and complex history of the transactions out of which the charges against the appellants arose is outlined in the reasons of Miller C.J.M. and more briefly in those of Freedman J.A. and of Guy J.A. I shall endeavour to state the relevant facts as briefly as is consistent with making clear the questions which arise on these appeals. I will deal first with the circumstances under which the appellants obtained control of Brandon Packers Limited.

Brandon Packers Limited was incorporated under the *Companies Act* of Manitoba in 1936. In that year it had sold a debenture issue of $200,000 falling due on December 1, 1956. The indebtedness remaining on this issue in 1956 was $79,100. Joseph C. Donaldson was the principal shareholder in Brandon Packers Limited. He and Miss Minnie E. Peary held 12,535 common shares, of the par value of $5, out of a total issued of 14,530; and Donaldson held 58,120

preferred shares of the par value of $1. Donaldson had been president and a director of the company from its inception and Miss Peary had been a director and secretary-treasurer for a number of years.

Early in 1956 Donaldson was considering selling his shares. It was clear that a new bond issue would have to be sold to provide the $79,100 required to pay the bonds maturing in December and the company, while solvent, was in need of additional working capital. Through one Allan Bass, who was acting as agent for Donaldson, the two accused became interested as possible purchasers of Donaldson's shares; in March 1956, they went to Brandon, inspected the company's plant and had a discussion with Donaldson as to the sale of his shares and the issue of bonds by Brandon Packers Limited.

Following negotiations, to which it is unnecessary to refer in detail, an agreement under seal dated June 11, 1956, was entered into between Donaldson as optionor and Paton Corporation Limited as optionee, whereby in consideration of $10,000 paid in cash the optionor granted an option, irrevocable up to September 30, 1956, to purchase all the shares of Brandon Packers Limited "owned or controlled by the optionor" namely, 12,535 common shares at a total price of $188,000 and 51,748 preferred shares at a total price of $51,748. If the option was exercised the transaction was to be closed on or before December 2, 1956. The common shares were to be paid for as follows: the $10,000 paid for the option was to be credited on the purchase price, $78,000 was to be paid in cash on closing, and $100,000 "in bonds to be issued by Brandon Packers Limited on the date of closing". (It was later arranged between the parties that $178,000 should be paid in cash to Donaldson on closing and that he should use $100,000 thereof to purchase $100,000 of the bonds). The preferred shares were to be paid for on or before December 2, 1957.

The option agreement contained the following paragraph:

> It is the stated intention of the optionee to procure that Brandon Packers Limited will issue bonds to the extent of $400,000.00 for sale and the optionor agrees to use his best endeavors to promote the sale of such bonds of the Company.

The evidence is clear that both of the accused were acting together in taking this option and in the various trans-

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actions which followed. At all relevant times the appellant Paton owned or controlled all the shares in Paton Corporation Limited, and similarly the appellant Cox controlled Leomar Investment Corporation Limited which was described as his personal holding corporation. The $10,000 payable at the time of the signing of the option agreement was paid by a cheque of Leomar Investment Corporation Limited.

On September 27, 1956, the appellants exercised their option under the agreement of June 11, 1956. The transaction was closed on November 21, 1956. In July, under circumstances to be mentioned later, a prospectus regarding the issue of $400,000 5½ per cent sinking fund bonds of Brandon Packers Limited had been signed and filed and by November 21, 1956, about $275,000 of the bonds had been sold. Prior to this date the appellants had obtained supplementary letters patent amending the charter of Fropak Limited, a company controlled by them, to permit it to issue preferred shares. On the evidence it was open to the jury to conclude that Fropak Limited had no assets of any value.

The purchase of Donaldson's shares was completed in the following way.

On November 20, 1956, the appellants met with Donaldson at Brandon in order to close out the transaction.

On November 20, 1956, Donaldson made out a cheque of Brandon Packers Limited for $200,000 payable to the Imperial Bank of Canada. This cheque was signed by Donaldson and Miss Peary.

On November 21, 1956, Brandon Packers Limited executed a contract to which the seal of the company was affixed, whereby Brandon Packers Limited agreed to purchase from Fropak Limited 2,000 preference shares of the par value of $100 each. This agreement was signed by the appellants on behalf of Fropak Limited and by Donaldson and Miss Peary on behalf of Brandon Packers Limited.

On the afternoon of November 21, 1956, the appellants and Donaldson met with John English, manager of the Imperial Bank at Brandon, in his office. At this meeting Donaldson turned over the $200,000 cheque of Brandon Packers Limited to English with a letter stating that the cheque was in payment of 2,000 preferred shares of Fropak

Limited. This cheque for $200,000 was deposited to the credit of an internal account in the bank, known as a remittance account. English then drew a cheque on the remittance account for $183,560, in favour of Donaldson which was endorsed by Donaldson, and deposited to the credit of his account. The balance in the remittance account, $16,440, was remitted by the bank to the Imperial Bank at Toronto to go to the credit of the account of Fropak Limited.

The difference between the amount of $183,560 and the $178,000 which, under the option agreement, was to be paid on closing is accounted for by the fact that on November 21, 1956, Donaldson held a total of 12,904 common shares of Brandon Packers Limited, having acquired an additional 369 shares after June 11, 1956. The purchase price of the 12,904 shares at $15 per share was $193,560. The sum of $10,000 had already been paid as a deposit, leaving a balance of $183,560.

While at the office of English on November 21, 1956, Donaldson drew a cheque on his account for the sum of $100,000 payable to Imperial Bank of Canada and delivered it to English to be used in payment for the bonds of Brandon Packers Limited purchased by Donaldson in accordance with the agreement referred to above. Later these bonds were delivered to Donaldson.

English was given a letter signed by Donaldson and Miss Peary authorizing the bank to turn over to Paton Corporation Limited and Leomar Investment Corporation Limited the 12,904 common shares of Brandon Packers Limited on receipt of the said sum of $183,560, and on November 21, 1956, English delivered these shares to the appellants.

Some time after November 21, 1956, 2,000 preference shares in Fropak Limited were issued to Brandon Packers Limited and the share certificates were delivered.

Paton Corporation Limited and Leomar Investment Corporation Limited each signed a promissory note dated November 21, 1956, for $91,780 in favour of Fropak Limited making up the sum of $183,560 which Fropak Limited had advanced to the said two corporations and with which Donaldson's shares were purchased.

It is to this transaction that the first item of the particulars of count 3 furnished by the Crown refers. Its true

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substance and effect are described by Freedman J.A. in the following passage in his reasons, which I wish to adopt:

> Paton and Cox obtained control of Brandon Packers Limited. Their net outlay for the acquisition of such control was exactly nil. Indeed their corporation, Fropak Limited, emerged from the transaction with a net gain of $6,440, being the difference between $200,000 invested by Brandon Packers Limited in preferred shares of Fropak Limited, less $193,560 paid to Donaldson. The daylight loan from the bank was the apparent but not the actual source of the funds making possible the implementation of the scheme. The real source was the monies in the hands of Brandon Packers Limited that had been obtained from the sale of bonds. It was the existence of these monies which guaranteed the immediate repayment to the bank of its loan so as to enable its advance safely to be made in the form of a daylight loan. In short, the two accused so arranged the transaction and so manipulated matters that the monies invested by the bondholders in Brandon Packers Limited became the source of the funds wherewith the accused purchased Donaldson's shares and acquired control of Brandon Packers Limited.
>
> Brandon Packers Limited did acquire preferred stock of Fropak Limited having a purported value of $200,000. Implicit in the entire transaction was the representation of the accused that this was a legitimate, *bona fide* investment for Brandon Packers Limited to make. In fact, however, Fropak Limited was not an operating company and it was entirely without assets. Its charter, which had lapsed, was admittedly revived by the accused for the purposes of this very transaction. At the same time supplementary letters patent were obtained, creating the preferred shares which were required in the implementation of the accused's scheme. For its $200,000 Brandon Packers Limited obtained shares whose worth was negligible.

We were informed that the phrase "daylight loan" denotes a loan which is made and repaid on the same day.

I do not find it necessary to deal in detail with the facts in regard to the remaining five items in the particulars shewing how it was alleged that the total of $460,000 mentioned in count 3 was made up. It is sufficient to say that as to items 2, 3, 4 and 5, the theory of the Crown was that the appellants, who were then in control of Brandon Packers Limited, expressly or by necessary implication represented that these sums were owing by that company to the appellants or to companies controlled by them and obtained payment thereof when they knew that in fact Brandon Packers Limited was not under liability to make any of the payments; and that as regards item 6 the loans made to companies controlled by the appellants were not merely unlawful in the sense that they were unauthorized but that the moneys "loaned" were paid over without any intention on the part of the appellants that they would be repaid.

Turning now to the grounds on which Miller C.J.M. dissented as to the conviction on count 3, I would first observe that, in my opinion, the appellants are entitled to rely on the particulars given orally by counsel for the Crown to the same extent as if they had been furnished pursuant to an order made under s. 497 of the *Criminal Code*. On this point I agree with the statement of Beck J.A. in *R. v. Carswell*[1]:

> S.859 (a predecessor of s.497) empowers the trial judge to order particulars.
>
> If he does so it must be clear that the prosecutor is bound by the particulars which he gives in accordance with the order.
>
> If without order he gives particulars he must be equally bound.

The grounds of dissent as to count 3 are those numbered 6 to 12 inclusive in the formal judgment of the Court of Appeal quoted above. It appears to me that these, other than number 7 which will be considered separately, raise in different words the following two questions of law:

> 1. Was count 3 bad on the ground that it charged not one offence but six separate offences contrary to s.492(1) of the *Criminal Code*?
>
> 2. Were the facts that the jury returned a verdict of guilty on both count 1 and count 3 and that this verdict was recorded fatal to the maintenance of either conviction so that as a matter of law both must now be quashed?

On the first of these questions I am in agreement with the reasons of Freedman J.A. and will not repeat them at length.

Count 3 charges a single conspiracy, existing over a considerable period of time, the object of which was to defraud Brandon Packers Limited of large sums of money by such fraudulent means as presented themselves from time to time. It is not necessary on this appeal to decide whether each of the six transactions referred to in the particulars was in itself an indictable offence separate from the other five or whether the evidence proved in regard to every one of these items that a crime was actually committed. Assuming that each was separate from the others and that count 4 was therefore bad, what count 3 alleged was that they were all planned in the course of carrying out the single conspiracy and there was evidence to justify the jury in so finding. It was the guilty agreement and not the several acts

[1] (1916), 10 W.W.R. 1027 at 1038.

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done in pursuance thereof which constituted the offence charged in count 3.

I agree with Freedman J.A. that for the purpose of dealing with the appeal as to count 3 it is sufficient to consider the first of the six transactions set out in the particulars. I have already quoted his summary of the effect of that transaction. I share the view which he expressed (with the concurrence of Schultz J.A. and, on this point, of Bastin J.) and which Guy J.A. expressed in separate reasons that this transaction constituted an offence under s. 323(1) of the *Criminal Code* and that there was ample evidence on which the jury could find the accused guilty of conspiracy to defraud as charged in count 3.

In the course of argument on this branch of the appeal counsel for the appellants submitted that there was no evidence that the appellants defrauded Brandon Packers Limited or that they intended to do so because, as it was said, there was no evidence of any false representation made to the company or of any official of the company having been deceived into parting with the moneys referred to in the particulars furnished. Assuming, without deciding, that there was a dissent on this point within the meaning of s. 597(1) of the *Criminal Code,* I would reject this argument. I will examine it only in connection with the transaction relating to the $200,000 which is the first item in the particulars. I have already indicated my agreement with the statement of Freedman J.A. that "implicit in the entire transaction was the representation of the accused that this was a legitimate *bona fide* investment for Brandon Packers Limited to make" and with his view that there was ample evidence to warrant a finding that this representation was false to the knowledge of the accused. If it deceived Donaldson, who was still nominally at least in control of the company, into paying over the $200,000 to Fropak that would be a fraud on the company. If, on the other hand, it is suggested that Donaldson was not deceived but paid the money over knowing that the transaction was not *bona fide,* that the Fropak shares were worthless and that their purchase was merely a step in a scheme to enable the accused to buy the shares of Brandon Packers Limited with its own money, that would simply be to say that Donaldson was *particeps criminis.* If all the directors of a company should join in

using its funds to purchase an asset which they knew to be worthless as part of a scheme to divert those funds to their own use they would, in my opinion, be guilty under s. 323(1) of defrauding the company of those funds. Even supposing it could be said that, the directors being "the mind of the company" and well knowing the true facts, the company was not deceived (a proposition which I should find it difficult to accept), I think it clear that in the supposed case the directors would have defrauded the company, if not by deceit or falsehood, by "other fraudulent means".

I turn now to the second question whether the recorded verdict of guilty on both counts 1 and 3 requires that both verdicts be quashed.

It has already been pointed out that counts 1 and 3 were expressly stated by counsel for the Crown to be alternative. In my respectful opinion the learned trial judge should have so instructed the jury in his charge and when the jury returned their verdict, instead of having it recorded he should have sent them back to reconsider it, with definite instructions that they must not return a verdict of guilty on both counts 1 and 3.

On this ground counsel for the appellants rely particularly on the following decisions: *Commonwealth v. Haskins et al.*[1]; *Heinze et al. v. State*[2]; and *R. v. Mills*[3].

The principle stated in the first two of these cases is summarized in the following passage in the reasons of Delaplaine J., who delivered the judgment of the Court of Appeals in Maryland in *Heinze et al. v. State,* at p. 130:

> It is unquestioned that a finding of guilty on two inconsistent counts is invalid. Thus where a defendant is charged in one count with larceny and in another count with receiving stolen goods, and it plainly appears that the property alleged to have been stolen is that also alleged to have been received, a general verdict of guilty is fatally defective, because in law a thief cannot be guilty of the crime of receiving stolen goods which he himself has stolen, and a guilty receiver of stolen goods cannot himself be the thief, and hence the defendant could not be guilty on both counts.

R. v. Mills is a decision of the Court of Criminal Appeal in England composed of Byrne, Slade and Salmon JJ. The

[1] (1880), 128 Mass. 60.
[2] (1945), 42 A. (2d) 128.
[3] Referred to in [1959] Criminal Case and Comment 188.

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note is brief and I have not been able to find a fuller report. The whole note reads as follows:

M. was tried at quarter sessions on an indictment containing four counts, namely, (i) larceny of a motor-car, (ii) taking and driving away the car without the owner's consent, (iii) receiving the car knowing it to have been stolen, and (iv) larceny of two number plates of the car. He was acquitted of the first two offences and convicted of the last two. The original number plates on the motor-car had been taken off and false number plates substituted. On appeal to the Court of Criminal Appeal:

Held, that the two verdicts of guilty were really mutually destructive. If M. had, as the jury found (owing perhaps to the deputy-chairman's unfortunate failure to give a sufficient direction with regard to possession), received the motor-car, then plainly he had received it with the substituted plates upon it, and he could not be found to have received the motor-car knowing it to have been stolen and at the same time to have stolen the two original number plates, for the two things stood together. Accordingly, the appeal would be allowed.

In my opinion, these cases rightly decide that the convictions of an accused (i) of stealing an article and (ii) of receiving the same article knowing it to have been stolen cannot both stand. But in so far as they hold that an Appellate Court has no power to uphold either conviction they appear to be at variance with the judgments of the Court of Appeal for Manitoba and of this Court in *Kelly v. The King*[1]. In that case the jury rendered a verdict of guilty on count 1, theft of money belonging to the King, count 2, unlawfully receiving money belonging to the King knowing the same to have been stolen and, count 4, obtaining money by false pretences from His Majesty. The convictions on these three counts were upheld by a majority judgment of the Court of Appeal.

It appears from p. 228 of the report in this Court that counsel for the accused argued that the accused could not be guilty of all three of these offences that he could not, indeed, be guilty of any two of them and that consequently the whole conviction was bad. This Court was unanimous in dismissing the appeal.

Anglin J., in whose judgment Fitzpatrick C.J. and Davies J. concurred, said at pp. 261 and 262:

Although the conviction of the appellant on three distinct counts in an indictment—No. 1, for theft, No. 2, for receiving, and No. 4, for obtaining money by false pretences—was upheld by a majority of the learned judges of the Court of Appeal for Manitoba, the Chief Justice, as we

[1](1916), 54 S.C.R. 220.

understand with the concurrence of Mr. Justice Perdue and Mr. Justice Cameron, said (35 West L.R. 57):—

> It is difficult to see how the accused should for one crime be found guilty on the first, second and fourth counts. That he has committed a crime seems by the evidence to be clearly established, and it is perhaps best established under the fourth count.
>
> I assume that the trial judge in pronouncing sentence will consider that the accused was found guilty of but one crime, and in considering the maximum sentence allowed by law I think he should be guided by the lowest maximum fixed by law for either of the three crimes set forth in the first, second and fourth counts.
>
> This course being taken, I do not think such substantial wrong or miscarriage was occasioned at the trial as would justify a new trial under sec. 1019 of the Code.
>
> There seems no necessity to interfere with the finding of guilty on the inconsistent counts. He was certainly guilty of one of them and as he will be punished on one only, I would follow the course taken in *Rex v. Lockett* (1914) 2 K.B. 720, at p. 733.

The formal judgment of the court, however, does not direct that the penalty to be imposed shall be so limited; but Mr. Coyne, while vigorously insisting that the conviction on all three counts should be sustained, stated at bar in this Court that, as counsel representing the Crown he submitted to the judgment of the Court of Appeal being dealt with as if it contained a provision under section 1020 of the Criminal Code limiting the penalty as indicated by the learned Chief Justice.

Having regard to all the circumstances of the case, and especially to the possible embarrassment which may have been caused by the trial together of five separate counts, and to the fact that the learned trial judge, while he carefully defined each of the offences charged, deemed it advisable to abstain from instructing the jury as to the facts in evidence bearing upon each branch of the indictment, we think the position taken by counsel for the Crown eminently proper and that "we ought to treat the verdict as a verdict on the lesser charge," namely, that of obtaining money by false pretences.

In the result the convictions on all three counts were allowed to stand. It seems clear that this Court was of opinion that the conviction on count 4 could be upheld in spite of its inconsistency with the convictions on counts 1 and 2.

If, however, it be assumed that the three cases relied on by the appellants were correctly decided they do not appear to me to be applicable to the circumstances of the case at bar. I incline to agree with the view expressed by Freedman J.A. that in the case of each of the six transactions referred to in the particulars the crime, if crime there was, was fraud rather than theft. But suppose it were otherwise and that some of the items particularized constituted fraud and others theft, there may well be a single conspiracy to com-

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mit a number of different offences; the cases of *R. v. Graham*[1] and *R. v. Rose*[2], referred to by Freedman J.A., are apt illustrations. The reason that the convictions on counts 1 and 3 cannot both be supported is not that they are "mutually destructive", as was said of the counts in *R. v. Mills, supra,* but rather that if both were allowed to stand the accused would in reality be convicted twice of the same offence. It is the same conspiracy which is alleged in the two counts and it would be contrary to law that the accused should be punished more than once for the same offence.

In my view, the Court of Appeal has power under Part XVIII of the *Criminal Code,* particularly s. 592(1)(*b*)(i) and s. 592(3), to decide that the conviction on count 1 should be quashed and that on count 3 affirmed.

It remains to consider the ground of dissent numbered 7 set out in the formal judgment of the Court of Appeal and quoted earlier in these reasons.

This ground is based on the premise that there was no evidence on which it was open to the jury to find that the moneys paid over as management fees were obtained from Brandon Packers Limited by fraud. In my opinion, there was evidence to support a finding that the appellants represented that these fees were owing when to their knowledge Brandon Packers Limited was under no liability to pay them. It was open to the jury to take the view that the services for which the fees purported to be paid were negligible and that the disproportion between the services rendered and the amount paid was so great as to shew that the transaction was fraudulent. The premise on which this ground is based is not established and it should be rejected.

I would accordingly dismiss the appeals as to the conviction on count 3.

The grounds on which the conviction on count 5 is attacked may be summarized as follows:

1. That the count is void in that it charges not one offence but the three separate offences of (i) making, (ii) circulating, and (iii) publishing a prospectus knowing the same to be false in a material particular with the intent specified in clause (*c*) of s. 343(1).

[1] (1954), 18 C.R. 110, 108 C.C.C. 153, 11 W.W.R. (N.S.) 565.
[2] (1946), 3 C.R. 277, 88 C.C.C. 114.

2. That there was no evidence that the appellants made, circulated or published the prospectus.

3. That there was no evidence that the prospectus was false in a material particular to the knowledge of the appellants.

4. That the count does not disclose any offence known to the law since it does not charge that the appellants published a prospectus with intent to induce an ascertained person or ascertained persons to advance moneys but charges an intent "to induce members of the public to advance moneys".

As to the first ground it will be observed that the count follows the wording of s. 343(1)(*c*) of the *Criminal Code* and it is necessary to consider the effect of s. 492(2)(*b*) and of s. 500(1)(*a*):

> 492(2) The statement referred to in subsection (1) may be
>
> * * *
>
> (*b*) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, . . .
>
> 500(1) A count is not objectionable by reason only that
>
> (*a*) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indicable offence the matters, acts or omissions charged in the count . . .

In my opinion, it is clear since the judgment of this Court in *Archer v. The Queen*[1] that these provisions do not render a count good if the words of the enactment which are adopted in framing the count describe more than one offence, and the question to be decided is whether the words of s. 343(1)(*c*) describe one offence or more than one.

I have reached the conclusion that s. 343(1)(*c*) creates only one offence, the essence of which is an attempt to induce persons to advance moneys to a company by means of a prospectus known to the accused to be false in a material particular and that the making, circulating or publishing are not separate offences but are modes in which the one offence may be committed. I would reject this first ground of appeal.

Ground 2 may be shortly dealt with. There is evidence that the issue and sale of the bonds was an integral part of the scheme of the appellants from its inception, that the

[1] [1955] S.C.R. 33, 110 C.C.C. 321, 2 D.L.R. 621.

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portion of the prospectus which the Crown claims to be false was drafted by the appellant Paton and approved by the appellant Cox, that it was sent by Paton to Donaldson with the intention that it be incorporated in the prospectus which was filed and circulated and that it was so incorporated. This was sufficient evidence to support a finding that both appellants took part in making the prospectus. I would reject this second ground of appeal.

As to the third ground the portion of the prospectus claimed by the Crown to be false in a material particular is that reading as follows:

PURPOSE OF ISSUE

The proceeds to be received by the Company from the sale of $400,000 of First Mortgage Bonds offered by the Prospectus, will be used by the Company for the redemption of outstanding debentures of $79,000, the expansion of its existing business and additions thereto, particularly with respect to the erection of a quick freezing and cold storage plant and for other corporate purposes.

If in fact at the time they arranged to have this statement incorporated in the prospectus the appellants had already formed the intention of using a large portion of the proceeds of the sale of the bonds not for any of the purposes stated (other than the redemption of the outstanding bonds) but for the purpose of providing themselves with the funds to purchase the shares of Brandon Packers Limited then, in my opinion, the prospectus was to their knowledge false in a material particular. There was evidence on which it was open to the jury to so find. That such a false statement was likely to induce and was intended to induce persons to purchase the bonds is obvious. As to this ground I am in general agreement with the views expressed by Freedman J.A.

Before concluding the examination of this ground of appeal it is necessary to consider the argument of counsel for the appellants that even if at the time of drafting the statement as to the purpose of the bond issue, quoted above, the accused had formed the intention of using a large portion of the proceeds of the sale of the bonds for the purpose mentioned in the preceding paragraph of these reasons, this circumstance did not render the prospectus "false in a material particular" within the meaning of that phrase as used in s. 343(1). It is said that an offence under this section is created only if the material particular in which the pros-

pectus is false amounts to a false pretence, that is to say is a representation of a matter of fact either present or past; that, whatever may be the rule in civil cases, a statement of present intention about future conduct does not amount to a false pretence in criminal law.

In support of this argument reliance is placed upon the decision of the Court of Criminal Appeal in *R. v. Dent*[1], and particularly the following passage in the reasons of the Court, delivered by Devlin J. and concurred in by Lord Goddard C.J. and Donovan J., at p. 595:

> The case for the prosecution is that when the appellant entered into each of the contracts in this case, he thereby impliedly represented that he intended to carry it out, whereas in fact he had no such intention. It is, of course, undisputed that to constitute a false pretence the false statement must be of an existing fact. The prosecution contend that a statement of present intention, although it relates to the future, is a statement of existing fact. That was the view expressed by Bowen L.J. in his celebrated dictum in *Edgington v. Fitzmaurice*:
>
> > There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.
>
> *Edgington v. Fitzmaurice* was an action for deceit. Whatever the position may be in civil cases, we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.

The charges on which the accused were convicted in *R. v. Dent* were all of obtaining moneys by false pretences; the convictions were quashed.

This judgment may be contrasted with that of the Court of Criminal Appeal in the following year in the case of *R. v. Ingram*[2]. The Court was composed of Lord Goddard C.J., Streatfield and Donovan JJ. The accused was convicted on six counts of obtaining credit by fraud contrary to s. 13(1) of the *Debtors Act* (1869) which reads as follows:

> 13. Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year with or without hard labour; that is to say,
>
> (1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud;

[1] [1955] 2 Q.B. 590.

[2] [1956] 2 All. E.R. 639.

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Donovan J. delivered the judgment of the Court. He said at p. 640:

> The appellant is an electrician, and the fraud alleged against him was this: that he obtained contracts from a number of shopkeepers to erect or renovate electric neon signs at an agreed price. He obtained payment of part of that price in advance, but did not do the work save for insignificant matters of a preparatory nature. He was in financial difficulties, and none of the advance payments was returned.
>
> The jury were properly directed that they could not convict the appellant unless they were satisfied, inter alia, that in obtaining these advance payments and then failing to do the work he was acting fraudulently, that is to say, that he never had any intention to do the stipulated work at the time when he received payments in advance. The jury, influenced no doubt by what appeared to be a systematic course of conduct on the appellant's part, convicted him, and it must accordingly be taken that they found that when he received part payments at the outset he had no intention to do the work he had undertaken to do. On any view, therefore, his conduct was fraudulent, but he argues that it involved no obtaining of credit and thus no offence under s. 13(1) of the *Debtors Act*, 1869.

The Court then examined and rejected the argument that the conduct, though fraudulent, did not involve obtaining credit and the convictions were affirmed.

Since two members of the Court which decided *R. v. Ingram* had taken part in the judgment in *R. v. Dent* given in the previous year, it can safely be assumed that they were of the view that there was no inconsistency between the two judgments. The reconciliation is found in the circumstance that in *R. v. Dent* to support the conviction it was necessary to find that there had been a false pretence while in *R. v. Ingram* it was sufficient to find that, although there had been no false pretence, there had been "other fraud".

It will be observed that s. 343(1) does not use the phrase "a false pretence". I have reached the conclusion that a prospectus may be "false in a material particular" within the meaning of the section if it contains a material statement as to the purpose for which the proceeds from the sale of the securities offered in the prospectus are to be used and it is found that the person making the statement had never any intention that the proceeds should be used for that purpose. The test is not, in my opinion, whether the statement amounted strictly speaking to a "false pretence" but rather whether the conduct of the accused in making it was fraudulent.

I would reject this third ground of appeal.

As to the fourth ground of appeal which has been set out above it could not be successfully argued that the use of the words "to induce members of the public" instead of the words of s. 343(1)(*c*) "to induce a person" misled or embarrassed the defence; but counsel argued that this is of no importance, that the offence created by the section is statutory and that conduct which does not fall within the words as well as within the spirit of the section is not an offence at all. The defence contends that on its true construction s. 343(1)(*c*) creates an offence only in a case where the intent of the accused is to induce an ascertained person to advance something to a company; emphasis is laid on the circumstance that the words "whether ascertained or not" which appear in clauses (*a*) and (*b*) of the subsection are omitted in clause (*c*). Counsel also contrasts the wording of clause (*c*) with that of s. 323(1) of the Code where the expression is used "defrauds the public or any person whether ascertained or not . . .".

Section 343(1)(*c*) is penal and must be strictly construed in favour of the accused, but in construing it, it is the duty of the Court to endeavour to give effect to the intention of Parliament as expressed in the words used. The construction contended for by the defence would render clause (*c*) virtually inoperative. The evil sought to be prevented is the use of a false prospectus to induce persons to advance moneys to a company. The occasions must be very rare in which a false prospectus is prepared with the purpose of inducing an ascertained individual to advance moneys. The primary purpose of a prospectus is to raise moneys from the public. In my opinion on its true construction s. 343(1)(*c*) makes it an offence for anyone to make, circulate or publish a prospectus which he knows is false in a material particular with the intent to induce any person to advance moneys to the company on whose behalf the prospectus is issued and the expression "any person" includes all persons of the class to whom the prospectus is intended to be given although at the time the false prospectus is made the identity of none of those persons is known. I conclude that count 5 does disclose an offence against s. 343(1)(*c*) and that this ground of appeal should be rejected.

In the result I am of opinion that all the grounds of appeal which are open to the accused on the appeals to this

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Court must be rejected and that the appeals against the convictions on both count 3 and count 5 must be dismissed.

In view of the statement of Crown counsel, mentioned above, that, in the event of the appeals of the accused failing, the Crown did not wish to press the appeals in regard to count 4 those appeals will be dismissed.

Appeals and cross-appeal dismissed.

Solicitors for the appellant Cox: Monk, Goodwin, Higenbottam & Goodwin, Winnipeg.

Solicitors for the appellant Paton: Walsh, Micay & Company, Winnipeg.

Solicitor for the respondent: Deputy Attorney-General for the Province of Manitoba.

1964 1 CR 474, 481, 487

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*Jun. 17

July 23

JOHN PATON THOMSON MORE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Capital murder—Whether murder was "planned and deliberate"—Meaning of word "deliberate"—Medical evidence showing impairment of ability to think—Whether misdirection as to weight of that evidence—Substantial wrong—Miscarriage of justice—Criminal Code, 1953-54 (Can.), c. 51, ss. 16, 201(a)(i), 202A(a)(iii), 592.

The appellant shot his wife through the head while she was asleep, early one morning. He then wrote a number of letters explaining why he had done it, that he was in financial difficulty and did not want his wife to suffer from it. During the afternoon, he attempted suicide by shooting himself. The attempt having failed, he telephoned the police in the evening to tell them what he had done. Three days before, he had secured a permit for the purchase of a revolver, but did not buy any. However, two days before the shooting he did buy a rifle and a box of shells with the intention, he said, of taking his own life.

At the trial for capital murder, the defence of insanity was specifically disclaimed by his counsel. However, two medical doctors testified that at the time of the shooting the appellant was suffering from a depressive psychosis resulting in "impairment of ability to decide even inconsequential things, inability to make up a decision in a normal kind of way". The trial judge, instead of leaving this medical evidence to the

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Judson, Ritchie and Hall JJ.

jury for their consideration, quoted from authorities to the effect that the testimony of experts is of slight weight.

The appellant was convicted of capital murder. In the Court of Appeal, all the judges were of opinion that there had been misdirection as to the weight to be given to the medical evidence on the appellant's state of mind at the time of the offence. The majority dismissed the appeal on the ground that there had been no substantial wrong or miscarriage of justice. The dissenting judge would have substituted a verdict of non-capital murder. The appellant appealed to this Court.

Held (Taschereau C.J. and Fauteux J. dissenting): The appeal should be allowed, the conviction quashed and a new trial directed.

Per Cartwright, Abbott, Judson, Ritchie and Hall JJ.: There was very strong evidence that the murder was planned, but the jury could not bring in a verdict of capital murder unless they were satisfied beyond a reasonable doubt that it was also deliberate. The word "deliberate", as used in s. 202A(2)(*a*), means "considered not impulsive". It cannot simply mean "intentional" for that is the prerequisite for murder, and the subsection is creating an additional ingredient as a condition of capital murder. On the facts and the evidence as to what happened at the moment of the shooting, it was open to the jury to take the view that the act of the appellant was impulsive rather than considered and therefore was not deliberate. The medical evidence would have had a direct bearing on that question; its weight was a matter for the jury. The enactment of s. 202A(2)(*a*) has in no way affected the interpretation or application of s. 16 of the Code. The medical evidence was not relied on as raising the question whether the appellant was legally sane, but its importance was that it would assist the jury in deciding whether the shooting was deliberate. On this question of fact, the appellant was entitled to have the verdict of a properly instructed jury.

The probable result of the unwarranted disparagement of the medical evidence, which was relevant and admissible, was its withdrawal from the jury's serious consideration. On a charge of capital murder, based on an allegation that the killing was planned and deliberate, it was virtually a withdrawal of the whole defence. In these circumstances, it could not be held that there was no substantial wrong or miscarriage of justice. Since the case has never really been considered by the jury on evidence which should have been before it, the appellant was entitled to a new trial.

Per Taschereau C.J. and Fauteux J., *dissenting:* It was uncontrovertible on the evidence that the murder was planned, i.e., "arranged beforehand", as found by the jury and the majority of the Court of Appeal. All that was done prior to and after the shooting was done in implementation of a plan. There was nothing in the evidence foreign to this plan, suggesting a sudden impulse to kill.

On the dictionary definition of the word "deliberate", it appears from both the English and French versions of s. 202A(2)(*a*) that the word qualifies the murder and that a time element is the material feature common to both the definition of "planned" and the definition of "deliberate". What Parliament intended was to exclude from the offence of capital murder a murder committed on the spur of the moment. There is nothing in the definition of either word which relates to the reasonableness or unreasonableness of the arrangement made beforehand or of the predetermination to kill. Irrationality of either may suggest a

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degree of mental irresponsibility legally apt to relieve from legal responsibility. But that is a matter for s. 16 of the Code. The factual and opinion evidence does not show that the ability of the appellant to think, reason and decide was abolished but impaired. To accept the submission that such an impairment, short of insanity within the meaning of s. 16 of the Code, is a defence, would be tantamount to introducing in the Canadian law a new and secondary text of legal irresponsibility, which Parliament has deliberately refused to adopt. The language of the enactment is inapt to justify such a departure from the system of our criminal law as is contended for by the appellant. It follows that there was no substantial wrong or miscarriage of justice resulting from the direction given by the trial judge as to the weight of the expert medical evidence.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming the appellant's conviction on a charge of capital murder. Appeal allowed, Taschereau C.J. and Fauteux J. dissenting.

John A. Scollin, for the appellant.

G. E. Pilkey, Q.C., for the respondent.

The judgment of Taschereau C.J. and of Fauteux J. was delivered by

FAUTEUX J. (*dissenting*):—The appellant was indicted and tried for the capital murder of his wife on the 27th day of September 1962 at the City of Transcona in the Eastern Judicial District in the Province of Manitoba.

The case as presented to the jury by the Crown and the defence respectively may briefly be stated:

The theory of the Crown was that the accused loved his wife but having accumulated heavy debts, of which he had not fully informed her, he became worried and depressed and that, when threatened with legal action which would have disclosed his true financial position to her, he shot her and attempted to commit suicide; on the evidence, the killing of his wife was motivated, intended, planned and deliberate, thus amounting in law to a capital murder under ss. 201(a)(i) and 202A (2)(*a*) of the *Criminal Code*. In defence the accused, who admittedly killed his wife on the 27th day of September last, pleaded that at the time he was an automaton, devoid of will, not knowing what he was doing, and that the Crown had failed to prove that the homicide was planned and deliberate; according to expert

[1] (1963), 43 W.W.R. 30.

medical evidence of two psychiatrists called by the defence, the accused was suffering from a diminution of his ability to think, reason, and decide at the time of the offence.

There is no evidence to support a defence of insanity under s. 16 of the *Criminal Code* and indeed after all the evidence had been adduced, such a defence was specifically disclaimed by counsel for the accused.

The jury, presided by Nitikman J., found the accused guilty as charged. Required under s. 642A—of which the provisions are applicable in any case of an offence punishable by death—to consider whether a recommendation that he should be granted clemency should be made, the jury so recommended.

On the appeal under s. 583 of the Code the verdict of the jury was upheld. The Court[1] found that the trial judge misdirected the jury on the weight to be given to the psychiatric expert medical evidence called for by the defence. Miller C.J.M., Schultz, Monnin and Guy JJ.A. found that no substantial wrong or miscarriage of justice had occurred, and upheld the verdict of the jury. Freedman J.A. dissenting considered that the expert evidence was of major importance on the issue whether the murder was planned and deliberate and would have substituted to the verdict of capital murder a verdict of non-capital murder.

Pursuant to s. 597A(*a*) of the Code, appellant then appealed to this Court on one ground which, as formulated in his notice of appeal to this Court, reads:

> The learned trial judge so misdirected the jury as to the weight to be attached to the medical evidence called by the defence that the (accused) appellant was not properly convicted of capital murder.

Involved in this ground of appeal are three matters to be considered. (i) Whether, upon the evidence it was open to the jury, not only to conclude as they and all the members of the Court of Appeal did, that the shooting of Mrs. More was intended—thus constituting murder under s. 201(*a*)(i)—but was also planned and deliberate, as they and the majority of the Court of Appeal found—thus constituting capital murder under ss. 201(*a*)(i) and 202A (2)(*a*) of the Code; and in the affirmative, (ii) whether impairment of the ability to think, reason and decide, short

[1] (1963), 43 W.W.R. 30.

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of insanity within the meaning of s. 16 of the Code, is a defence to the offence charged; and, (iii) whether in the result there was any substantial wrong or miscarriage of justice.

The complete and unchallenged review of the evidence appearing in the reasons for judgment of Schultz J.A. may be summarized as follows: On September 4, 1962, the accused, who had become a free lance photographer, secured part-time employment as a school bus driver, hoping that by undertaking to turn over his wages to Transcona Credit Union, his most urgently pressing creditor, he would avoid legal action being taken against him and his wife, co-signer for the debt. The Credit Union refused his proposal and through its solicitor advised him his wife's wages at Eaton's would be garnisheed on September 28 if the debt were not paid in full before that date. On September 24, which was four days before the deadline set by Credit Union and three days before that of the murder, the accused obtained a permit from the police to convey a revolver from a Sporting Supplies store to his residence. On September 25, shortly after 9:00 a.m. he asked for two days off from his school bus driving employment on the admittedly false pretext that he and his wife had to go east to bring back his father-in-law whom he falsely represented as having had a heart attack. Later the same morning, he went to the Sporting Supplies store to buy a revolver, representing again admittedly falsely, that he required it for use in connection with Sea Cadet activities. He left the store without making a purchase and went to the T. Eaton Company where he purchased a single shot .22 calibre rifle and a box of 50 cartridges. The rifle was taken home and kept there in the cellar without the knowledge of his wife. On September 27, at 6:00 a.m., according to his testimony, his wife while asleep was shot by him through the forehead, the rifle being held not more than 6 inches at the most from the head. Between 6:00 a.m. and 10:00 a.m. he testified he wrote numerous documents hereafter referred to, which he left on the kitchen table. At 8:00 a.m., according to independent testimony, he telephoned his wife's employer that she would not be in to work that day as she was ill. At 10:00 a.m. he testified that his sister, Mrs. St. Jean, telephoned and asked him to drive her downtown, which he did, mentioning

nothing to her on the occasion about the killing of his wife. He testified that around 4:00 p.m. he laid down beside his dead wife, shot himself through the head, and that expecting to die from his serious, though not fatal, wound he stayed lying in the bed. At 8:00 p.m. he telephoned a constable at the Transcona Police Station, identified himself and said:

> I shot my wife this morning and myself this afternoon, but I did not do a good job on myself, so I had better go to the hospital. Come to the side door.

Upon the arrival of the police he volunteered:

> I shot her this morning, shot myself at about 4:00 o'clock, did not make a good job, financial problems; it is all there,

and he pointed to the numerous documents lying on the kitchen table. On the way to the hospital in the police car, having been duly cautioned, he said:

> the only thing I have to say is I have financial problems, and I was going to do away with both of us, that is all.

The following day in the hospital and again after being cautioned he declared to the police officers:

> I had some financial problems. It was worrying my wife so much. She was a very nervous type of person. Anything like this would upset her. Actually I had a choice of doing one of two things, either going to personal bankruptcy which would probably upset her so much that it would upset her happiness or doing what I did by trying to take both our lives. That's all there is to it.

He testified that when he made the last two statements he was under the impression that he was going to die and trying to be truthful and not hide anything.

The substance of the documents written and left by appellant on the kitchen table or mailed by him when he left his home to drive his sister downtown tallies with these voluntary declarations made to the police immediately after the event. The documents also indicate his debts in great detail, the location of his insurance policies and those of his wife, and contained the disposition to be made of his estate. A letter written and mailed to a close friend reads in part:

> Please read the following very carefully before you do anything.
>
> I shot Marge early this morning & am now going to do away with myself.

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Please get Joe Teres Transcona Chief of Police & tell him to come to the house 330 Harvard Ave. W. & here is the key to the side door. Do not come in with him because it is a horrible sight to see, I know because I know what Marge is like & I just hope I have the courage to finish what I have started. We are both in the back bedroom . . .

I hope this will do some good some where, & I really don't feel too badly, because Marge & I have had a good life together even if it has been shortened by this act. I'll close now as I must join Marge & I hope to 'Go with God'.

In a three-page note to Mrs. St. Jean, her husband and family, he wrote:

I am sorry to do this, but as far as I can see it is my only way out.

Marge is so upset and worried lately that it is hurting me deeply. Marge and I love each other very deeply & have had a real good & happy life together & in one way I think I am doing the right & best thing.

Please try & not feel too bad about us, because at least we are still together & if there is another world beyond this one I hope Marge & I have as much happiness there as what we have had here on earth.

* * *

Well I guess that's it for now. Once again please don't feel badly about us, as we have always been happy together & we will still have our happiness as we are still together.

In a further note to Mrs. St. Jean, admittedly written after he had driven her to work, he wrote in part:

. . . When you get the insurance money be sure to straighten out your affairs & do as I asked this morning if you don't have cash for it don't buy it. I just wish I had taken my own advice & this would not be necessary.

Please try and find happiness instead of sadness over this, as I'm sure Marge & I will be happy together in the future as we have been in the past . . .

I know it's easy to say, but please don't feel badly about us and enjoy your lives as much as Marge & I have.

While on his evidence all the documents were written on the morning of the 27th, after the shooting of his wife, many bear a prior date. At trial he said he back-dated these particular documents, this to overcome any possible suggestion that he might not have been sound of mind when they were written which would cause them to be ineffectual. Two such documents are significant. The first is dated the day before the murder; it is headed "Last Will and Testament of John P. T. More", of which the opening words are "Being of sound mind at the time of writing this, I hereby declare this to be my last will and testament". The second is dated the 24th, to wit the day he obtained the permit from the police to carry a revolver to his residence; it lists 14 items

of expensive photographic equipment and provides for their return partly to a creditor and the balance, not to his wife but to Mrs. St. Jean. Shown this last exhibit at trial, he could give no explanation why it was dated September 24.

Subject to the consideration of matters raised for the appellant, on this evidence it was manifestly open to the jury to conclude that the killing of Mrs. More was intended, planned and deliberate.

That it was intended was found by the jury and all the members of the Court of Appeal. It was also, by necessary implication if not expressly, admitted by appellant who did ask this Court to reduce the verdict of capital murder to one of murder simpliciter. The defence of automatism was rejected by the jury which disbelieved the evidence of the appellant at trial as to what occurred at the moment of the discharge of the rifle. This defence was abandoned in this Court.

That the murder was planned, *i.e.*, "arranged beforehand"—cf. the Shorter Oxford Dictionary—as found by the jury and the majority of the Court of Appeal is, in my respectful view, uncontrovertible on the above evidence accepted by the jury. There was a plan and one plan only; and all that was done by the appellant, prior to and after the shooting of his wife, was done in implementation of this plan. With deference to my brother Cartwright, I find no evidence, of anything foreign to this plan, suggesting that the accused was suddenly impelled to kill his wife at the moment of the discharge of the rifle. Obviously the jury, having rejected the evidence as to what occurred at the time of the discharge of the rifle, could not rely on or infer from the same evidence impulsivity intervening at that particular moment.

From appellant's factum and the oral argument, the grievance as to the direction of the trial judge with respect to the weight to be attached to expert medical evidence is rather fundamentally related by him to the question whether the murder was deliberate within the meaning he gives to this word under the provisions of s. 202A (2)(*a*). To dispose of the merits of this appeal, this Court, in my respectful view, must unavoidably determine the meaning of the word "deliberate" under these provisions of the *Criminal Code* and their legal effect in the case.

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In the Shorter Oxford Dictionary, the word is thus defined:

> *Deliberate:* well weighed or considered, carefully thought out, done of set purpose, studied, not hasty or rash. Of persons: characterized by deliberation, considered carefully, leisurely, slow, not hurried.

The first part of the definition is related to an action; the second part is related to a person. Under the provisions of the section the word "deliberate" qualifies not the person charged but his action, i.e. the murder. In the French version of these provisions, the expression "de propos délibéré" stands for the word "deliberate", and, according to the Larousse XXe siècle, means "à dessein—de parti pris—de dessein formé, arrêté à l'avance". In Harrap's Standard French and English Dictionary, the expression "of set purpose" is translated "de propos délibéré, de parti pris". In the same dictionary, the word "predetermination" is translated "détermination prise d'avance; dessein arrêté".

Thus it appears from both the English and French versions, which in the consideration of a federal statute must be read together, *Composers, Authors and Publishers of Canada Ltd. v. Western Fair Association*[1], that a time element is the material feature common to both the definition of the word "planned" and the definition of the word "deliberate". This feature was not a constitutive element of murder under the state of the law as it was prior to the enactment of s. 202A (2)(*a*). All of which reasonably indicates that what Parliament intended, by adding it as such, was to exclude from the offence, henceforth categorized as capital murder, a murder committed on the spur of the moment. There is nothing in the definition of either of the words "planned and deliberate" which relates to the reasonableness or unreasonableness of the arrangement made beforehand or of the predetermination to kill. If, in the context of the relevant part of ss. 201(*a*)(i) and 202A (2)(*a*), from which stems the definition of capital murder, the words "planned" and "deliberate" were held to imply reasonableness, what type of planned and deliberate murder could be held by a jury to be reasonable and when would these provisions have any application, I am unable to say. Irrationality of either, if appearing in a given case, may

[1] [1951] S.C.R. 596, 12 Fox Pat. C. 1, 15 C.P.R. 45, [1952] 2 D.L.R. 229.

suggest a degree of mental irresponsibility legally apt to relieve from legal responsibility. The policy of the law in this respect is not stated in s. 202A (2)(*a*) but in s. 16 of the Code, which appearing in Part 1 of the Code is all-embracing with respect to the question of insanity in criminal matters. Of course it is for the prosecution to show and for the jury to say whether it is shown by the evidence that the offence charged is intended, planned and deliberate. The mental capacity to commit this as well as any other offence is another matter altogether. For it is a matter of defence to displace the presumption created in the imperative terms of s. 16(4)—"Everyone shall, until the contrary is proved, be presumed to be and to have been sane". This presumption cannot be displaced by factual or opinion evidence unless such evidence meets the test of legal irresponsibility set forth in s. 16(2), (3). The factual and opinion evidence in this case does not show that the ability of the appellant to think, reason and decide was abolished but impaired. The evidence does not meet the legal test; on the contrary Dr. Adamson affirms that the accused was capable of appreciating his unlawful acts and added that he could not convince himself that the accused did not know the difference between right and wrong at the time of the offence.

Acceptance of appellant's submission that mental defect or disease not sufficient to render an accused legally irresponsible under s. 16 of the Code may nevertheless operate to reduce the degree of the crime charged is tantamount to introducing in the Canadian law a new and secondary test of legal irresponsibility as was done in England prior to the enactment of the provisions of s. 202A (2)(*a*) by the *Homicide Act 1957*, 5 & 6 Eliz. 2, c. 11, of which s. 2(1) and (2) read:

> 2. (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

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Undoubtedly aware of these provisions, the Canadian Parliament deliberately refused to adopt them. If the appellant's submission is accepted, it follows that the Canadian Parliament has adopted rather obliquely a policy more generous than that of the English law. Contrary to what is the case in England, the prosecution in Canada would further have the burden of proving, as a constitutive element of the offence of capital murder, not only that the accused is mentally sane within the meaning of s. 16, but also that his mental responsibility is not affected to a lesser degree for which no legal standard is given. Again on appellant's submission there are two different tests of legal irresponsibility with respect to the offence of capital murder. The first being with respect to intent is defined in s. 16; the other being with respect to planning and deliberation is left to the arbitrament of the jury to define in each case. I am unable to read the section as implying such substantial innovations and changes in our Criminal Law.

In the United States, the tests of irresponsibility of the various jurisdictions, in cases involving insanity as a defence to crime, are reviewed in Weihofen, Mental Disorder As A Criminal Defence, at pages 129 et seq. In most of the jurisdictions, it appears that where the law of the State includes specific intent, deliberation or premeditation as constitutive elements of a murder of first degree, it is held that insanity, not sufficient to require an acquittal, may not be shown to negative intent, deliberation or premeditation, and so reduce the crime to murder in second degree.

There is a presumption against implicit alteration of the law and one of these is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares. It is in the last degree improbable that the Legislature would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness. (Maxwell on Interpretation of Statutes, 9th ed., pp. 85 et seq.). In my view, the language of the enactment—which on the above meaning of the words "planned and deliberate" is truly related to a time element—is inapt to justify such a departure from the system of our Criminal Law as is contended for by appellant.

On that view of the law, impairment of mental capacity short of insanity was not a defence to the crime charged. It follows that there was no substantial wrong or miscarriage of justice resulting from the direction given by the trial judge as to the weight of the expert medical evidence. For while relevant to a defence of insanity—to negative intent or that the murder was planned and deliberate—, in this particular case the evidence adduced was admittedly short of showing insanity to the degree required by law to relieve from legal responsibility. And, again, insanity as a defence was specifically disclaimed. To the extent that it could be relevant to the consideration of a recommendation that the accused should be granted clemency, there was no prejudice, for such a recommendation was made.

I would dismiss the appeal.

The judgment of Cartwright, Abbott, Judson, Ritchie and Hall JJ. was delivered by

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Judson and wish to add only a few words on one aspect of the matter.

It does not appear to have been argued by counsel for the Crown at any stage of the proceedings that the evidence of Dr. Adamson and of Dr. Thomson was not relevant to the question whether the appellant was guilty of capital murder; and all of the learned judges in the courts below have proceeded on the view that it was relevant. In my opinion they were clearly right in so doing.

In the circumstances of this case, the defence of insanity having been expressly disclaimed, there were really only two questions for the jury. The first was whether the appellant meant to cause the death of his wife; if this was answered in the affirmative he was guilty of murder. The second, which arises under s. 202A (2)(*a*) of the *Criminal Code*, was whether this murder was planned and deliberate on his part; if this was answered in the affirmative he was guilty of capital murder.

The evidence that the murder was planned was very strong, but, as was properly pointed out to the jury by the learned trial judge, they could not find the accused guilty of capital murder unless they were satisfied beyond a reasonable doubt not only that the murder was planned but also

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that it was deliberate. The learned trial judge also rightly instructed the jury that the word "deliberate", as used in s. 202A (2)(*a*), means "considered not impulsive". Other meanings of the adjective given in the Oxford Dictionary are "not hasty in decision", "slow in deciding" and "intentional". The word as used in the subsection cannot have simply the meaning "intentional" because it is only if the accused's act was intentional that he can be guilty of murder and the subsection is creating an additional ingredient to be proved as a condition of an accused being convicted of capital murder.

The recital of the facts and the evidence of the appellant as to what occurred at the moment of the discharge of the rifle, set out in the reasons of my brother Judson, show that it was open to the jury to take the view that the act of the appellant in pulling the trigger was impulsive rather than considered and therefore was not deliberate. The evidence of the two doctors and particularly that of Dr. Adamson, also quoted by my brother Judson, that, in his opinion, at the critical moment the appellant was suffering from a depressive psychosis resulting in "impairment of ability to decide even inconsequential things, inability to make a decision in a normal kind of a way" would have a direct bearing on the question whether the appellant's act was deliberate in the sense defined above; its weight was a matter for the jury.

I wish to emphasize that all that I have said above is related to the peculiar facts of this particular case.

Since writing the above, I have had an opportunity of reading the reasons of my brother Fauteux and I wish to make it clear that in my opinion the enactment of s. 202A (2)(*a*) of the *Criminal Code* has in no way affected the interpretation or application of s. 16. The evidence of the two doctors is not relied on by the defence as raising the question whether the accused was legally sane. Its importance is that it would assist the jury in deciding the question whether the accused's action in pulling the trigger, which so far as this branch of the matter is concerned was admittedly the intentional act of a sane man, was also his deliberate act. This question is one of fact and its solution involves an inquiry as to the thinking of the accused at the moment of acting. If the jury accepted the evidence of the doctors it,

in conjunction with the accused's own evidence, might well cause them to regard it as more probable that the accused's final act was prompted by sudden impulse rather than by consideration. On this question the accused was entitled to have the verdict of a properly instructed jury.

I would dispose of the appeal as proposed by my brother Judson.

The judgment of Cartwright, Abbott, Judson, Ritchie and Hall JJ. was delivered by

JUDSON J.:—The Manitoba Court of Appeal[1], with Freedman J.A. dissenting, has affirmed the conviction of the appellant on a charge of capital murder. His appeal asks this Court to set aside the verdict of guilty of capital murder and substitute a verdict of guilty of non-capital murder, or, in the alternative, to quash the conviction and order a new trial.

The issue in the appeal is sharply defined in the reasons for judgment delivered in the Court of Appeal. All the judges were of the opinion that the learned trial judge had misdirected the jury on the weight to be given to the medical evidence called by the defence on the appellant's state of mind at the time of the offence. The majority considered that the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code* applied and that there had been no substantial wrong or miscarriage of justice despite the wrong decision of the learned trial judge on a question of law. Freedman J.A., dissenting, held that the appellant was not properly convicted of capital murder but should have been convicted of non-capital murder and would have substituted the latter verdict under s. 592(3) of the *Criminal Code*. The issue therefore is whether the majority of the Court of Appeal was correct in holding that there was no substantial wrong or miscarriage of justice.

The accused shot his wife through the head while she was asleep about 5 o'clock on the morning of September 27, 1962. He then wrote a number of letters explaining why he had done it. He concealed his crime during the day and during the afternoon he attempted suicide by shooting himself through the head. Although seriously wounded, he did

[1] (1963), 43 W.W.R. 30.

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not die and at 8 o'clock in the evening of September 27, he telephoned the police to tell them what he had done.

There is no history of matrimonial discord in this family, either remote or immediate. The accused married his wife in 1942 and the evidence indicates that they lived together happily. From 1942 to 1945 the accused served in the Navy. On his return to civilian life he completed his apprenticeship as an upholsterer and worked at this trade for 12 years in the employment of the Canadian National Railways. He left this employment to start his own business as a photographer. In this he was unsuccessful. He accumulated many debts; he was being hard-pressed by his creditors at the time of the crime; and there is no doubt that he was suffering from some mental disturbance that caused him to do what he did.

On September 24 he had secured a permit for the purchase of a revolver. He made some enquiries at a shop about the purchase but did not go through with it. At that time he gave a false reason for his interest in a revolver. On September 25 he bought a rifle and a box of shells with the intention, he said, of taking his own life because of worry about his financial problems and the effect upon his wife of their impending discovery.

He was up twice during the night of September 27 thinking about his troubles while his wife was sleeping. He said that the second time he got up was about 5 a.m. and that he sat around smoking and thinking. He gave his description of the shooting in the following words:

> From there the only next thing I can remember is standing by the bed with the rifle in my hand and hearing it go off.

He also said that immediately before the rifle was discharged he was thinking

> what my wife and I had here on earth and what it would be like in a better world ahead, Heaven . . . I thought what a better place it would be, that we would not need to think of money problems or anything like that.

The letters that he wrote after the shooting of his wife indicated the same kind of mental disturbance. Dr. Gilbert L. Adamson, who had been practising in the field of neurology and psychiatry in Winnipeg since 1931, and who had recently retired as Associate Professor of Medicine in

the University of Manitoba, gave the following opinion about the mental condition of the accused at the time of the killing:

I formed the opinion that on the 27th day of September 1962 he was suffering from an abnormal state of mind, which is referred to as a depressive psychosis, in which the symptoms are severe depression, hopelessness, inability to sleep, loss of appetite, loss of weight, and impairment of volition—that is to say, impairment of ability to decide even inconsequential things, inability to make up a decision in a normal kind of a way. In this state, a person is so hopeless, their feelings are so hopeless, that their judgment becomes distorted, and their thinking confused.

Dr. Ian Blake Thomson, Assistant Medical Superintendent of the Psychiatric Institute in Winnipeg and a lecturer in psychiatry at the University of Manitoba, expressed the following opinion:

. . . I formed the opinion that he had during the course of last year . . . suffered from symptoms of depression, and that towards the end of the period in question—that is, in September of last year, during the month of September—his condition deteriorated very markedly, so that the depression deepened and became a severe depression with great feelings of despair and despondency and hopelessness; and he suffered from brooding preoccupation which interfered with his ability to work, to reason, to think, and that at the time of the alleged offence, this condition very probably was one which in medical terms is called a "psychosis", which is a major mental illness.

This is very important and highly relevant evidence given by men of eminence in their profession. The learned trial judge instead of leaving it to the jury for the consideration to which it was entitled, quoted from Phipson on Evidence, Taylor on Evidence and Lord Campbell, to the effect that the testimony of experts is of slight weight.

From Phipson on Evidence, 9th ed., p. 403, he quoted:

The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories . . .

From Taylor on Evidence, 12th ed., p. 59, he quoted:

Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses* . . . it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them.

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From Lord Campbell's judgment in the *Tracy Peerage* case[1], he quoted:

> Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.

I agree with Freedman J.A. that as generalizations, these statements are bad. They could, moreover, have no possible application to the evidence given in this case. All the judges in the Court of Appeal were of the opinion that the medical evidence was relevant and admissible and that there was error in the judge's instruction. In the context in which this instruction was given, the only possible reference is to the evidence of Dr. Adamson and Dr. Thomson and the probable result of this unwarranted disparagement of their evidence was its withdrawal from the jury's serious consideration. On a charge of capital murder, based on an allegation that the killing was planned and deliberate, it was virtually a withdrawal of the whole defence.

I agree with Freedman J.A. that in these circumstances the Court cannot hold that there was no substantial wrong or miscarriage of justice. I would, however, not substitute a verdict of non-capital murder. This case has never really been considered by the jury on evidence which should have been before it.

I would allow the appeal, quash the conviction of capital murder and direct a new trial.

Since writing these reasons, I have had the opportunity of reading the reasons of my brother Cartwright and I agree with them.

Appeal allowed and new trial directed, TASCHEREAU C.J. *and* FAUTEUX J. *dissenting.*

Solicitors for the appellant: Pitblado, Hoskin & Company, Winnipeg.

Solicitor for the respondent: Attorney-General for Manitoba.

[1] (1843), 10 Cl. & F. 153 at 191, 8 E.R. 700.

ROBERT J. WRIGHT, JOSEPH P. McDERMOTT AND VINCENT B. FEELEY ..... APPELLANTS;

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*Mar. 20, 21
Jun. 24

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Special pleas—Conspiracy—Interference with administration of justice—Six count indictment—Whether acquittal on conspiracy charge a bar to prosecution on second conspiracy charge—Autrefois acquit—Res judicata—Criminal Code, 1953-54 (Can.), c. 51, ss. 101(b), 518.

The three appellants, W, M and F, were indicted on six counts. Count 1 related to a conspiracy to commit an indictable offence by giving money to a peace officer with intent that the said officer should interfere with the administration of justice. This count was tried separately. All three were acquitted and the Crown's appeal was abandoned.

Count 2 related to a conspiracy to effect the unlawful purpose of obtaining from the same peace officer information which it was his duty not to divulge. Counts 3, 4 and 5 related only to W and charged him with paying money to the peace officer with intent that the latter should interfere with the administration of justice. Count 6 related to the keeping of a common gaming house by F and M, to which they pleaded guilty at a later trial.

At the second trial, the conspiracy under count 2 was tried as well as the substantive offences against W under counts 3, 4 and 5. The special plea of autrefois acquit and the defence of res judicata were raised not only against count 2 but also by W against the substantive offences. On the conspiracy charge, the trial judge held against the appellants on the plea of autrefois acquit, also that the defence of res judicata did not arise and declined to submit it to the jury. The jury convicted. However, on the three counts against W, the judge gave effect to the defence of res judicata and directed the jury to acquit. The appellants appealed against the conspiracy conviction and the Crown appealed against W's acquittal. The Court of Appeal affirmed the conviction on count 2 and ordered a new trial for W on counts 3, 4 and 5. The appellants were granted leave to appeal to this Court on count 2 and W appealed as of right from the order setting aside his acquittal.

Held (Cartwright and Hall JJ. dissenting): The appeal against the conviction on count 2 should be dismissed as well as the appeal of W against a new trial on counts 3, 4 and 5.

Per Taschereau, Fauteux and Judson JJ.: The Court of appeal was right in rejecting the plea of autrefois acquit and in finding that the trial judge was correct in his ruling under s. 518 of the *Criminal Code*. The conspiracies charged in count 1 and in count 2 were not substantially identical. Count 1 involved not only the payment of money but required proof of the intent that the officer should interfere with the

*PRESENT: Taschereau, Cartwright, Fauteux, Judson and Hall JJ.

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administration of justice. On the other hand, count 2 did not involve as an element the payment of money with the intent mentioned in s. 101(*a*) but charged the appellants with having conspired for an object which did not necessarily involve an intent that the officer should interfere with the administration of justice.

The trial judge was right in ruling that there was nothing to submit to the jury on the defence of res judicata in respect of count 2. An acquittal on a charge of conspiracy does not pronounce against every part of it. There was no issue on which it could be said that the Crown was estopped in the second trial. The two counts charged two conspiracies with different component elements, and it was impossible to say that the substantial basic facts common to both counts had been determined in favour of the appellants in the first trial.

As to counts 3, 4 and 5 relating to W, the Court of Appeal was right in ordering a new trial. The verdict at the first trial acquitted W of nothing more than his participation in the conspiracy charged on count 1 and did not of necessity involve a finding that he did not commit the substantive offence against s. 101(*b*) charged in those counts.

Per Cartwright and Hall JJ., *dissenting*: The plea of autrefois acquit was not available to the appellants at the trial on count 2. On their trial on count 1 the appellants could not have been convicted on count 2.

It is for the judge to decide as a matter of law whether the defence of res judicata has been made out, and, therefore, the trial judge was right in refusing to admit as an exhibit to go to the jury the complete record of the first trial.

The trial judge should have held that the defence of res judicata had been established at the trial on count 2. The Crown was now estopped from questioning that which was (in fact and law) the ratio of and fundamental to the decision in the first trial. Although the two counts differed in language and in their essential elements, in reality they dealt wtih the same offence. There was only one conspiracy—if there was a conspiracy. The conspirators were not interested in just getting information or in just having the officer give information unlawfully, they wanted the information so as to be forewarned of the impending raids on their gambling clubs. Everything that could be considered unlawful under count 2 was part and parcel of the agreement under count 1. Only one agreement was in evidence and it could not be severed arbitrarily at some point by the Crown so as to create the illusion of two offences from what was in fact only one.

The Crown was not estopped by W's acquittal under count 1 from proceeding to try him for the substantive offences under counts 3, 4 and 5. *McDonald v. The Queen*, [1960] S.C.R. 186, referred to. However, his acquittal under count 1 negatived the essentially criminal element of these substantive offences—the intent that the officer should interfere with the administration of justice. It would not now be open to the jury to find that the money which W admitted having given was given with that intent. W's acquittal should be restored.

APPEALS by the three appellants from a judgment of the Court of Appeal for Ontario[1], affirming their conviction

[1] [1963] 1 O.R. 571, 38 C.R. 321, 1 C.C.C. 254, 38 D.L.R. (2d) 133.

on a conspiracy charge and setting aside a verdict of acquittal in the case of W on charges of corruption. Appeals dismissed, Cartwright and Hall JJ. dissenting.

J. J. Robinette, Q.C., for the appellant, McDermott.

J. Sedgwick, Q.C., for the appellant, Feeley.

P. Hartt, Q.C., for the appellant, Wright.

R. P. Milligan, Q.C., for the respondent.

The judgment of Taschereau, Fauteux and Judson JJ. was delivered by

JUDSON J.:—The three appellants were tried before Spence J. and a jury and acquitted in May 1961 on the first count in an indictment, which was:

1. *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT B. FEELEY*, between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario, did unlawfully agree and conspire together to commit an indictable offence under Section 101(*b*) of the Criminal Code of Canada by corruptly giving money to George Scott, a Peace Officer of the Ontario Provincial Police, with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 408(1)(*d*).

The Crown abandoned an appeal against the acquittal and in March 1962, the three appellants were tried before Donnelly J. and a jury on the second count in the indictment, which was:

2. *AND FURTHER THAT* the said *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT BERNARD FEELEY*, between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario, did unlawfully agree and conspire together to effect an unlawful purpose, to wit, to obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408(2).

The judge held against the accused on a special plea of *autrefois acquit* and they then entered a plea of "Not Guilty" and offered the alternative defence of *res judicata*. The judge held that this defence did not arise and declined to submit it to the jury. The jury convicted and the conviction was sustained by a unanimous judgment in the Court of Appeal[1].

[1] [1963] 1 O.R. 571, 38 C.R. 321, 1 C.C.C. 254, 38 D.L.R. (2d) 133.

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I adopt in their entirety the reasons of the Court of Appeal in rejecting the defence of *autrefois acquit*, and their finding that the learned trial judge was correct in his ruling under s. 518 of the *Criminal Code*. The matter is summarized by Schroeder J.A. in the following paragraph:

> The conspiracy alleged in count 1 involved not only the payment of money to Constable Scott, but an essential ingredient of the offence was the intent of the alleged conspirators that George Scott should interfere with the administration of justice. Count 2, on the other hand, accuses the appellants of having entered into an entirely different kind of conspiracy. It does not involve as an element the payment of money corruptly to Scott or to any other person with the intent mentioned in s. 101(a)(iv) but its object or purpose was stated simply to be the obtainment from Constable Scott of information which it was his duty not to divulge. It was established at the trial that the provisions of the Police Act, now R.S.O. 1960, c. 298 and the Regulations passed pursuant thereto prohibited a police officer from disclosing such information to anyone, but the procurement of that breach of duty did not necessarily involve an intent on the part of the procurers that the police officer should interfere with the administration of justice. Count 2 simply charges the commission of the common law offence of "conspiracy to effect an unlawful purpose." The intent with which the parties are alleged to have entered into the conspiracy charged in count 1, namely, that he (Scott) should interfere with the administration of justice, is not an ingredient of the offence charged in count 2, and its absence is a significant point of distinction between the two offences. They are not substantially indentical or practically the same, and on that ground alone the defence based on the special plea of *autrefois acquit* cannot prevail.

On the defence of *res judicata* the trial judge treated the case as one in which there was no evidence to go to the jury that the first trial had determined in favour of the accused an issue or issues which would determine the second trial in their favour. But the defence says that the facts proved at both trials were the same or substantially the same, the conspirators were the same, the payments of money were the same and the person to whom the payments were made was the same person in each count. The defence argues from this that all the issues in count 2 have been litigated in favour of the accused by their acquittal on count 1, and that the case should have been submitted to the jury on this basis with an appropriate direction from the trial judge. The argument is supported by reference to the defence put forward at the first trial where everything was admitted in the presentation to the jury except the corrupt intent.

The weakness in this submission is in trying to read too much into the verdict of not guilty on count 1 where the

two counts charge conspiracy. At the first trial, the jury found that the proven facts did not amount to the conspiracy charged. At the second trial, the jury found that the same or substantially identical facts did amount to the conspiracy charged in count 2. An acquittal on a charge of conspiracy does not pronounce against every part of it. On what issue is there an estoppel against the Crown? Is it on the agreement or the corruptly giving or the intent in count 1? All that a judge or a jury, if it becomes fit matter for submission to a jury at the second trial, can determine is that the evidence fell short of warranting a conviction on the precise charge. There is no issue on which it can be said that the Crown is estopped in the second trial. This distinguishes the defence of *res judicata* in this case from the comparatively simple examples of its application in cases where there is an estoppel on issues such as identity of the accused (*The King v. Quinn*[1]); possession (*Sambasivam v. The Public Prosecutor*[2]), responsibility for the death of two persons as a result of the same catastrophe, where an acquittal on a charge of manslaughter of A must result in an acquittal on the same charge for the death of B, the whole matter having been litigated, adversely to the prosecution in the first trial (*R. v. Sweetman*[3]; *Gill v. The Queen*[4]).

These simplicities do not arise when the two counts charge two conspiracies with different component elements. It is impossible in the present case to say that the substantial basic facts common to both counts have been determined in favour of the accused in the first trial. The trial judge was right in his ruling that there was nothing to submit to the jury on this defence and I agree with the reasons of the Court of Appeal in affirming his ruling.

Counts 3, 4 and 5 in the indictment relate only to the appellant Wright. Count 3 reads:

> 3. AND FURTHER THAT the said ROBERT J. WRIGHT at the Municipality of Metropolitan Toronto in the County of York on or about the 29th day of February, 1960, did give corruptly to Constable George Scott, a peace officer of the Ontario Provincial Police Force, $400.00 in money with intent that the said George Scott should interfere with the administration of justice contrary to the Criminal Code of Canada, Section 101(*b*).

[1] (1905), 11 O.L.R. 242, 10 C.C.C. 412.
[2] [1950] A.C. 458.
[3] [1939] O.R. 131, 2 D.L.R. 70, 71 C.C.C. 171.
[4] [1962] Que. Q.B. 368, 38 C.R. 122.

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Counts 4 and 5 are in the same terms but refer to payments on subsequent dates.

On these counts, at the second trial, the learned trial judge did give effect to the defence of *res judicata* and directed an acquittal. The Crown appealed to the Court of Appeal against this acquittal and it was there held that there was error in law in giving this direction. The Court of Appeal set aside the order of acquittal on these counts and directed that there should be a new trial. I would affirm the order of the Court of Appeal on this aspect of the appeal for the reasons given by them, namely, that the verdict at the first trial acquitted Wright of nothing more than his participation in the conspiracy charged in count 1 and did not of necessity involve a finding that he did not commit the substantive offence against s. 101(b) charged in counts 3, 4 and 5.

The result is that the appeal of the three appellants against their conviction on count 2 is dismissed and the appeal of the appellant Wright against the order of the Court of Appeal directing a new trial on counts 3, 4 and 5 is also dismissed.

CARTWRIGHT J. (*dissenting*):—I agree with the reasons and conclusions of my brother Hall and wish to add only a few words.

In my respectful view the Court of Appeal[1] erred in considering and comparing the wording of the several counts in the indictment without making a sufficiently careful examination of the evidence adduced and the directions given by the presiding judge at each of the trials. The extracts from the transcripts of the proceedings in the two trials set out in the reasons of my brother Hall appear to me to make plain, what becomes, if possible, even more plain on an examination of the complete records, that in the trial on count 2 the jury were invited to pass upon the very same issue of fact as had already been decided in favour of the appellants by the jury at the trial of count 1.

The following words of Douglas J. delivering the unanimous judgment of the Supreme Court of the United States in *Sealfon v. U.S.*[2] appear to me to be in accordance with

[1] [1963] 1 O.R. 571, 38 C.R. 321, 1 C.C.C. 254, 38 D.L.R. (2d) 133.
[2] (1948), 332 U.S. 575 at 578.

our law and applicable to the circumstances of the case at bar:

> It has long been recognized that the commission of the substantive offence and a conspiracy to commit it are separate and distinct offences. thus with some exceptions, one may be prosecuted for both crimes. But *res judicata* may be a defence in a second prosecution. That doctrine applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offences be different.
>
> Thus the only question in the case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offence. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial.
>
> Respondent argues that the basis of the jury's verdict cannot be known with certainty.
>
> * * *
>
> The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict.
>
> * * *
>
> So interpreted the earlier verdict precludes a later conviction of the substantive offence. The basic facts in each trial were identical.
>
> * * *
>
> It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do.

With the greatest respect for those who hold a contrary view, after an anxious perusal of the records in the two trials I see no escape from the conclusion that the trial before Donnelly J. was a second attempt by the Crown to prove the agreement which was necessarily adjudicated in the trial before Spence J. to be non-existent. I am in complete agreement with the opinion of the Supreme Court of the United States from which I have quoted above that this the prosecution may not do.

In *The Queen v. King*[1], Hawkins J., with the concurrence of Cave, Grantham, Lawrance and Wright JJ., stated, not as a new rule but as one which was long established, that "it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts". I am unable to see how the judgment appealed from can be upheld without a violation of those first principles.

[1] [1897] 1 Q.B. 214 at 218.

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I would dispose of the appeals as proposed by my brother Hall.

HALL J. (*dissenting*):—On May 29, 1961, the appellants came before Spence J. and a jury on an indictment as follows:

1. *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT B. FEELEY*, between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario did unlawfully agree and conspire together to commit an indictable offence under Section 101(*b*) of the Criminal Code of Canada by corruptly giving money to George Scott a peace officer of the Ontario Provincial Police Force, with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 408(1)(*d*).
2. AND FURTHER THAT the said *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT BERNARD FEELEY* between the first day of January, 1960 and the first day of July, 1960, in the Province of Ontario did unlawfully agree and conspire together to effect an unlawful purpose, to wit: to obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408(2).
3. AND FURTHER THAT the said *ROBERT J. WRIGHT* at the Municipality of Metropolitan Toronto in the County of York on or about the 29th day of February, 1960, did give corruptly to Constable George Scott, a peace officer of the Ontario Provincial Police Force, $400.00 in money with intent that the said George Scott should interfere with the administration of justice contrary to the Criminal Code of Canada, Section 101(*b*).
4. AND FURTHER THAT the said *ROBERT J. WRIGHT* at the Municipality of Metropolitan Toronto in the County of York on or about the 29th day of March, 1960, did give corruptly to Constable George Scott, a peace officer of the Ontario Provincial Police Force, $200.00 in money with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 101(*b*).
5. AND FURTHER THAT the said *ROBERT J. WRIGHT* at the Municipality of Metropolitan Toronto in the County of York on or about the 27th day of April, 1960, did give corruptly to Constable George Scott a peace officer of the Ontario Provincial Police Force, $400.00 in money with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 101(*b*).
6. AND FURTHER THAT the said *JOSEPH P. McDERMOTT* and *VINCENT BERNARD FEELEY* at the Township of Toronto in the County of Peel during the month of May, 1960, and previously, did unlawfully keep a disorderly house, to wit: a common gaming house at the premises situate and known as 2165 Centre Road South in the Township of Toronto in the County of Peel, contrary to the Criminal Code of Canada, Section 176(1).

The Crown elected to proceed with the trial of count 1 only.

After a trial which lasted nine days, the jury found the appellants not guilty. An appeal from that verdict was taken by the Crown but later abandoned, so the acquittal on count 1 stands.

Then on March 12, 1962, the appellants came before Donnelly J. and a jury to be tried on counts 2, 3, 4, 5 and 6.

When called upon to plead to count 2, Wright, by his counsel, Mr. O'Driscoll, entered a special plea pursuant to s. 516 of the Code as follows:

> I have a special plea for the accused Wright. Having heard the said indictment read here in Court, the said Robert J. Wright saith that our said Lady the Queen ought not further to prosecute the said Indictment against him, the said Robert J. Wright, because he saith that, heretofore, to wit, on the 9th day of June, 1961, in the Supreme Court of Ontario, in the City of Toronto, in the Province of Ontario, before the Honourable Mr. Justice Spence and a Jury, he, the said Robert J. Wright, was lawfully acquitted of the said offence charged in the said Indictment.
>
> Wherefore he, the said Robert J. Wright, prays Judgment and that he may be discharged from the said premises in the said Indictment specified.

being a plea of autrefois acquit.

McDermott by his counsel Mr. Brooke entered the same special plea.

Feeley followed the same course by his counsel Mr. Sedgwick.

Mr. Milligan for the Crown replied as follows:

> In reply thereto and hereupon I, R. P. Milligan, Crown Counsel who prosecutes for our said Lady the Queen in this behalf, says that by reason of anything in the said plea of the said all three accused above pleaded in bar alleged, our said The Lady, The Queen, ought not to be precluded from prosecuting the said indictment against the said three accused; because she says that the said three accused were not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said three accused hath above in their said plea alleged; and this he, the said R. P. Milligan prays may be inquired of by the country.

The issues of these special plea of autrefois acquit were fully argued by counsel for the accused and counsel for the Crown. Intertwined in the autrefois acquit argument were submissions that the plea of *res judicata* was also available and that it was being put forward on behalf of the three appellants.

Donnelly J. gave judgment on the special plea as follows:

> The three accused rely on a special plea of autrefois acquit. Section 517 of the Code requires that I decide this issue. The three accused were before

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this Court in May and June, 1961, on the first count in the indictment at which time the jury acquitted all three on the charge on which they were then before the Court.

It is now agreed that there will be no new evidence offered if the trial proceeds on the second count. If there was any change in the evidence it will simply be that the Crown will not offer all the evidence which was adduced before. Section 518 of the Code provides that where an issue on a plea of autrefois acquit to a count is tried and it appears that the matter on which the accused was given in charge of the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of autrefois acquit is pleaded judgment shall be given discharging the accused in respect of that count.

In considering the matter I must keep in mind the statement of Crown counsel that no new evidence will be offered on the second count. The test is not the similarity of the evidence or the facts in the particular case. The question is whether the charges are identical, or substantially identical. It then remains to consider whether the charges under Count 1 and Count 2 are substantially identical. By Count 1 the accused were charged that they conspired together to commit an indictable offence under Section 101(*b*) of the Criminal Code of Canada by corruptly giving money to George Scott, a peace officer of the Ontario Provincial Police Force, with intent that the said George Scott should interfere with the administration of justice, contrary to Section 408(1)(*d*). The second count charges that the accused did unlawfully agree and conspire together to effect an unlawful purpose, to wit, to obtain from George Scott, a constable of the Ontario Provincial Police Force, information which it was his duty not to divulge contrary to the Criminal Code of Canada, Section 408(2).

On behalf of the accused it is urged that the jury having rendered a verdict of not guilty they found that the accused did not conspire together. People, when conspiring, may conspire to do one or more unlawful acts. It does not follow that because the jury found the accused not guilty on a charge of conspiring to do a specific unlawful act that the jury found the accused did not conspire to do any unlawful act.

On the first trial the jury was instructed that the essential elements of the offence were, firstly, the agreement to give money to Scott corruptly; secondly, the intent that Scott should interfere with the administration of justice. It is clear that these are the elements of the offence charged in the first count. In order to establish the offence charged in the second count it is not necessary for the Crown to prove any agreement to give or pay money to Scott corruptly. Section 101 makes it an essential part of the offence that the person committing the offence intend that the party offered or receiving the money interfere with the administration of justice. No such intent is required under Section 482. It was argued by counsel for Feeley that Count 1 could have been drawn in such a way that it would have included the second count. If this had been done it is my opinion that the count would be bad for duplicity. I find that the offence charged in the second count is not an offence included in the first count and that it would not have been possible on the former trial, no matter what amendment had been made, to have convicted the accused of the offence charged in the second count.

It is well established that a person must not be placed in peril of being convicted twice for the same offence. Here the offences are not the

same or substantially the same. The result is that the accused are not being asked to stand trial a second time for the same offence notwithstanding that the evidence will be the same as on the former trial.

The accused have failed to establish that the offence charged in the second count is substantially the same as that charged in the first count, or one on which they could have been convicted at the first trial and the plea of autrefois acquit fails.

Will you have the prisoners plead, please.

And as to *res judicata* the record is as follows:

HIS LORDSHIP: Before leaving the matter I should deal with the question of res judicata. I am of the opinion that this is a defence included in a plea of not guilty and should not be dealt with by me at this time.

Mr. SEDGWICK: So long as that is clear, that in pleading not guilty res judicata is pleaded as being an included plea.

HIS LORDSHIP: That is my view.

Mr. SEDGWICK: It is not provided for as an included plea. I intend to stress that as part of the defence.

HIS LORDSHIP: As far as I am concerned you are free to raise it as part of your plea of not guilty.

Following this counsel for the appellants applied to have count 2 tried separately from counts 3, 4, 5 and 6. Donnelly J. directed the Crown to proceed with count 2 only and the trial proceeded on that basis after pleas of Not Guilty had been directed to be entered by Donnelly J. following similar statements by all three appellants that "I enter no plea at this time."

Following the selection of a jury the record of the trial before Spence J. was tendered. Donnelly J. dealt with the matter as follows:

HIS LORDSHIP: I am not going to permit the filing of the evidence. If you wish to file it with the Court I am content that it be filed, but I do not propose to permit these books of evidence or any documents which you have asked to file—I do not propose to permit them to go to the jury. If you wish to file them with the Court for the use of counsel I am content that they be filed for that purpose, but for that purpose only.

But the record was not then filed.

Mr. Milligan opened for the Crown. In view of the arguments advanced on behalf of the appellants, it is desirable to quote rather fully from Mr. Milligan's opening statement. He said in part:

Mr. MILLIGAN: Gentlemen of the jury, simply put the offence is this, that the three accused agreed and conspired together to obtain information from a police officer which that constable was not at liberty to give them.

Now, gentlemen, the Crown alleges that the accused McDermott and Feeley were gamblers, that they are interested in two clubs—chartered

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clubs where gambling was allowed, that is legal gambling, and the Crown alleges it was suspected at times there was illegal gambling going on in the club. Now, you will appreciate, gentlemen, that the police would want to check these clubs to see if any illegal gambling was going on in these clubs, and to check these clubs there is only one way to do it, and that is not to tell the people they were coming to inspect them because they would certainly not find anything then, but to raid quickly and without notice, to swoop down on the club, walk in and then see if there is any illegal gambling, and if the police did find that there was illegal gambling, of course the club would be charged and probably put out of business. *The Crown alleges that naturally McDermott and Feeley would be very interested to know when these clubs would be raided and on what dates so that they would be ready.*

How would they get that information? I submit to you that the only way they can get the information is to get it from some person in authority who knew the raid was going to take place—was going to be conducted. The Crown alleges that for some time the accused Wright in the year 1953/1954 was in what is known as an anti-gambling squad of the Ontario Provincial Police. The anti-gaming squad is a branch of the Ontario Provincial Police which deals almost entirely with the suppression of illegal gambling. Wright was on that squad, and you can draw your inferences from the evidence of what connection Wright had with the accused McDermott and Feeley.

In any event, in the early part of 1960, in January 1960, the accused Wright was transferred out of the anti-gambling squad to duty in the Town of Belleville. *The Crown alleges now that the accused McDermott and Feeley had lost their contact. Wright was now out of the anti-gaming squad, he would not be able to tell them when and at what time the raids would be conducted. Another source of information had to be obtained. The Crown alleges that then the three accused conspired together to obtain that information from a member of the anti-gaming squad, namely Constable Scott.*

Scott was approached, and how he was approached will be tendered in evidence, and how information was obtained from him will be tendered in evidence, but the Crown alleges that they did conspire to obtain information from Scott, a member of the anti-gaming squad, that they did obtain information from Constable Scott, and that Constable Scott—and I should say the information they obtained from Constable Scott is unlawful for Constable Scott to give, or for any police officer, of the anti-gaming squad to give.

Now unfortunately for the three accused Scott was approached and without letting the accused know he reported to his superior officers. The superior officer when Scott was first approached by the accused Wright, who was at that time, as I told you, still a member of the Ontario Provincial Police, stationed at Belleville—but Wright did not say whom he was working for, so the superior officers naturally wanted Scott to play along with Wright because they wanted to find out who Wright was working for. In other words, may I put it this way, they were not so much interested, or they were interested in seeing that Wright was arrested and booked, but they were certainly interested in who Wright was working for, and so Scott was instructed to play along and he did play along, and eventually contact was made, particularly with the accused McDermott, eventually directly by Scott to McDermott, and *you will hear evidence of McDermott's dealings with Scott to obtain information as to when and what times the raid would be made on these clubs.* You will hear evidence

of the implication of the accused Feeley with the accused McDermott in these clubs, that they were partners and had other dealings together and they were associated together, and the Crown is alleging that on that evidence, which will be submitted to you, there is only one inference you gentlemen can draw—that they were all associated together and that for a common purpose and for a common interest they conspired to obtain information from Constable Scott of the anti-gaming squad, and that for the unlawful purpose as set out in the indictment. (The italics are mine.)

The evidence for the Crown was led and received and was similar to the evidence that had been given in the trial before Spence J. except that some of the evidence at the first trial was omitted at the second trial.

The next matter of importance to note is what transpired at the conclusion of the Crown's case. Mr. Hartt on behalf of Wright renewed the application to file as an exhibit the record of the trial before Spence J. The discussion between Donnelly J. and Mr. Hartt is as follows:

Mr. HARTT: I understand at the beginning of this trial an application was made by Mr. Sedgwick, then counsel for Mr. Feeley, that the copy of the transcript of the evidence of the former trial of these three accused persons should be entered as an exhibit in this case. I understand that at that time you made a ruling that you would not allow it in at that stage as an exhibit, but you would allow it to be filed with the Court.

I subsequently was informed that the copy that had been furnished to you was a copy that had been marked by some other person and I received a copy to-day that was not in that condition from the Court of Appeal and I would ask your lordship to allow me to file that copy with the Court.

HIS LORDSHIP: As an exhibit?

Mr. HARTT: My application is as an exhibit.

HIS LORDSHIP: What have you to say as to whether it should be filed as an exhibit or not? I am giving you this opportunity of arguing this. It was argued on behalf of the other accused earlier. In view of the fact you were not present I consider you should have an opportunity of making a presentation at this time.

Mr. HARTT: I will be brief.

My submission is that the defence which arises from a plea of not guilty and res judicata is one which I will submit is open to us in this case. With regard to that defence it is my understanding that it is a question, first of all, for your lordship whether or not the evidence in this trial—whether or not the issue in this trial is identical to the issue previously and is judicially determined.

HIS LORDSHIP: No, that is the plea of autrefois acquit or autrefois convict, but not the basis of res judicata. You may have different issues but some essential fact which is common to the two issues on which a decision has been given; it is certainly not the basis of res judicata.

Mr. HARTT: I think res judicata is a wider matter than autrefois acquit.

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HIS LORDSHIP: In my view it covers the situation entirely. There is some relation but it is a different principle.

Mr. HARTT: If I may put it this way—it is a factual issue which was directly placed before a competent tribunal and it was determined and it is not open to one of the parties to the original inquiry to raise it again. It is my submission to your lordship by reference to the charge in the first trial, to the manner of procedure adopted in relation to that charge, and the issue that eventually went to the jury, the factual issue that went to the jury, realistically went to the jury, that is the same issue that this jury is being asked to determine. If I am right in that, it is my submission that the issue is originally for your lordship, and then if you do not think the jury should be directed in relation to it then it becomes an issue for the jury. On that basis it is my submission that this transcript should be marked as an exhibit in the trial because I see no other way how the jury can ascertain what the real issue was at the first trial, the real factual issue.

My application is an alternative one, that it be marked as an exhibit in the trial for all purposes, and if your lordship does not accede to that request that it be marked as an exhibit before the Court in order to allow me to argue the question of defence before your lordship.

HIS LORDSHIP: Mr. Hartt, I am of the same opinion I was earlier, that the transcript should not be filed as an exhibit. It should not be available to the jury in the jury room. *In my opinion that applies even though the evidence in the two trials is exactly the same.* It is quite apparent that in this trial there was not as much evidence called as there was in the other trial. Witnesses were called in the other trial who did not testify in this trial. If that evidence was filed as an exhibit the jury would have the evidence of those witnesses before them. In my opinion that would be most improper. If the transcript of the proceedings in the earlier trial went to the jury in their jury room, it is most likely that the jury would dispose of the matter, not on the evidence which they heard at this trial and on which they are sworn to examine the matter, but on the written transcript which they would have before them. Being human beings and having the written transcript of a previous trial, if their memory is at all vague as to what a witness said at this trial, they would consider the evidence which was given at a previous trial.

These accused must be tried on the evidence tendered during this trial and not on the evidence during the previous trial. I must refuse your application to have the transcript filed as an exhibit. I told counsel at the opening of the trial, when this matter was argued, I was quite content to have the transcript filed with the Court for use of counsel and the Court but that it would not go to the jury room and I am still content to have that done if you desire it.

Mr. HARTT: I have given to Mr. Bradley a fresh copy of the evidence, if your lordship would refer to that in the course of my argument.

My first submission to your lordship is that on the authorities, and on the Court of Appeal and the Supreme Court of Canada it is clear that res judicata is a defence.

HIS LORDSHIP: I made that clear at the opening. I consider res judicata was a defence included in a plea of not guilty, and a defence open to the accused in this case—open to them to argue in this case.

Mr. Hartt thereupon applied to have Donnelly J. hold that the defence of *res judicata* had been made out and that the jury be directed to return a verdict of not guilty.

Donnelly J., in the course of the argument, at p. 1102 of the record, said:

HIS LORDSHIP: I think in view of the addresses and the charge I must come to the conclusion that the jury in the first trial either found that there was not the intent to interfere with the administration of justice or were not satisfied beyond a reasonable doubt of that ingredient.

Mr. MILLIGAN: Then do I understand your lordship to say that the intent to pervert the course of justice is res judicata?

HIS LORDSHIP: I would, on the evidence, on the charges and on the addresses, I can come to no other conclusion but that the elements as pointed out by the learned trial Judge, that there must be an agreement to pay Scott money and an intent to interfere with the administration of justice—what other finding would you suggest is warranted by the addresses and the finding of the jury?

and he gave judgment on this application at p. 1111:

HIS LORDSHIP: The accused rely on the maxim of res judicata and point out that these three accused were earlier acquitted of an offence that—

> between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario they did unlawfully conspire together to commit an indictable offence under Section 101(b) of the Criminal Code of Canada by corruptly giving money to George Scott a peace officer of the Ontario Provincial Police Force, with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 408(1)(*d*).

It would appear that the evidence which was tendered by the Crown on the present charge was tendered together with other evidence on the earlier charge.

In his charge to the jury on the trial of the first count in the indictment, the learned trial judge pointed out to the jury that the essential elements of the offence with which the accused were charged were, firstly, the agreement to give money to Scott corruptly, secondly, the intent that Scott should interfere with the administration of justice. In his address to the jury, counsel for the accused Wright admitted that Wright had given to Scott sums of money totalling one thousand dollars, and based his defence solely on the contention that Wright did not have the intention to interfere with the administration of justice. Counsel for McDermott spoke to the jury of the necessity of the intent to interfere with the administration of justice and suggested that McDermott was caught between the two officers who were spying on each other. Counsel for the accused Feeley submitted to the jury that Wright did not have the intent to interfere with the administration of justice, and said that if Wright did not have that corrupt intent, which was an essential element of the charge against all three men, then that was the end of the case against Wright and the end of the case against McDermott and Feeley.

When charging the jury the learned trial judge discussed the payment of money to Scott by Wright, and pointed out that it was admitted by

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counsel for Wright that he did pay money to Scott and in return passed on information to at least McDermott. In dealing with the question of intention he pointed out to the jury that it was important that they consider whether Wright did this corruptly in order to interfere with the administration of justice, because that was the whole gravamen of the charge.

In order for the defence to succeed on a plea of res judicata there must have been in the earlier proceeding a finding adverse to the Crown on some point which it is essential for the Crown to prove on the second charge. Counsel for the accused contend, while the intention to interfere with the administration of justice was an essential element in the first count, it was also an essential element on the second count on which the accused are presently before the Court, and that the finding of the jury acquitting the accused on the charge under the first count establishes a lack of intent on the part of Wright to interfere with the administration of justice. My reading of the addresses and the charge together with the verdict of the jury satisfies me that the finding of the jury turned on the essential element of intention to interfere with the administration of justice. Counsel for the accused contend the acquittal negatives such intent. If the verdict of the jury turned on this vital element, it cannot be said that the jury found that there was no such intent. It may very well have been that the verdict was the result of a reasonable doubt as to whether the Crown had proven such intent. While an intent to interfere with the administration of justice is an essential element in the first count of the indictment, in my opinion it is not an essential element in the second count and the Crown need not prove such intention. I must therefore hold that there is no finding which can be taken from the verdict of the jury which deals with any of the essential elements of the second charge. In my opinion a finding of not guilty which would appear to have been based on the failure to prove this essential element in the first charge is not sufficient ground for allowing the motion of the defence on the plea of res judicata, as this element is not essential in this second charge. I must find that the defence has failed to establish res judicata.

Mr. Hartt then submitted to Donnelly J. that he should charge the jury that the Crown was estopped from challenging any of the findings on the first trial and that counsel for the accused should be permitted in addressing the jury to point out to the jury what the issues were in the first trial and the results of the first trial.

Donnelly J. disposed of the submission as follows:

HIS LORDSHIP: I do not consider that the accused in their addresses to the jury are entitled to refer to the results of the first trial, or what inferences they consider can be drawn from the verdict of the jury in that trial. In my opinion, as I have indicated, the jury were influenced in arriving at their decision or the verdict at which they did arrive, by a consideration whether or not the Crown had proven the intent which was an essential element of the first charge. In view of my finding that this is not an essential element in the second charge, I find that no reference should be made on behalf of the accused to the jury finding.

Does that clear up your problem?

Mr. HARTT: I wanted to make perfectly clear we are not entitled to any of the issues in the first trial?

HIS LORDSHIP: No, this is a different trial, a different charge, a different offence.

Mr. HARTT: Your lordship is taking the defence of res judicata away from the jury?

HIS LORDSHIP: Yes, that is my judgment.

Mr. MILLIGAN: Your lordship is not saying I am estopped from saying they are related to these clubs?

HIS LORDSHIP: I make no finding on that. I say the only finding which could reasonably be drawn from the verdict in the first case is that the jury had some doubt whether the Crown had satisfied the onus in regard to proving this intent. Anything further than that would be speculation, as I see it.

and he dealt with the same matter at p. 1125:

Mr. HARTT: Could I refer to the part of the transcript to show the issues before the last jury and this one?

HIS LORDSHIP: These are entirely different issues, in my ruling. Possibly I did not make it clear yesterday, but what I intended was this, that neither you nor Mr. Nasso nor Mr. McDermott may mention to the jury the issues in the trial of the first charge or the results of that trial. In my understanding it is my duty to rule on the question of whether res judicata has been successfully established by the defence, and that it is not a matter for the jury. You understand that, Mr. McDermott?

After the judge's charge to the jury, Mr. Hartt asked the judge to charge the jury that in view of Wright's acquittal on count 1 it should be put to the jury that Wright did not have an unlawful purpose of conspiring for an unlawful end with McDermott and Feeley.

Mr. Hartt put his request as follows:

I suggest to your lordship if you accept my premise that I have a finding he was acting in accordance with the administration of justice then it is impossible for the jury to find that there is an illegal agreement in relation to the accused Wright.

* * *

Put it this way, that a previous jury has found Wright did not have this intent and it is not open to this jury to make a contrary finding. Therefore it must be put to the jury that it cannot be found that he had, or Wright had an unlawful intent in relation to what he was doing and that being an essential to the agreement to bring about an unlawful purpose that he cannot be found guilty on that indictment.

The Crown's position was stated by Mr. Milligan on p. 1174:

I want to comment on Mr. Hartt's objection; the main one is that he would like your lordship to put the issue of res judicata to the jury. He would like your lordship to put to the jury that a previous jury having

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found that there was no unlawful purpose, or that Wright did not intend to effect an unlawful purpose they should not consider that. I submit if your lordship put it to them in that way you might as well tell the jury to acquit.

The learned judge's ruling was:

> In regard to the objection that I must tell the jury that they cannot convict Wright unless they find that he obtained this information or agreed to obtain this information for an unlawful purpose it is not necessary for the Crown to show any unlawful purpose and it is wrong for me to so instruct the jury.

The jury found the three appellants guilty as charged on count 2. That left counts 3, 4 and 5 against Wright only and count 6 against McDermott and Feeley to be dealt with. Wright was tried on counts 3, 4 and 5 by Donnelly J. on March 23, 1962. When the counts were read to him, he entered a plea of not guilty. A jury was empanelled. Mr. Milligan for the Crown opened the case to the jury as follows:

> May it please your lordship. Gentlemen of the jury, you have heard the charges read to you by the Clerk of the Assize and in simple language they simply indicate that the Crown alleges that the accused Wright, in 1960, a member of the Ontario Provincial Police Force, had been a member of the Anti-Gaming Squad of that Police and he was transferred to Belleville. On the Anti-Gaming Squad at the same time with Constable Wright was Constable Scott who remained and still is a member of the Anti-Gaming Squad Branch. The Crown alleges that Wright, for the purpose of tipping off gaming houses as to raids on them by the Provincial Police, approached Scott to get the information of these raids.
>
> The Crown alleges that he offered Scott money and that Scott then reported to his superior officers and he was told to continue the investigation, in other words, as an underhand man, and Scott then continued his contact with Wright and subsequently Wright on three occasions, the 29th February, 1960, the 29th March, 1960, and the 27th April, 1960, the accused Wright gave Scott—gave him on the first occasion $200, $400, and $200, for payment for tip-offs of raids on gaming houses. Scott took that money to his superior officers after taking note of the money so that he would be able later to identify the money.
>
> The Crown alleges that Wright, having received information from Scott of the dates of the raids, passed that information on to the operators and the raids were made on the gaming houses and the gaming houses were ready for the police. The Crown alleges that the accused, in the terms of the charges laid, bribed corruptly Constable Scott for the purpose of perverting the course of justice.

Constable Scott was the only witness called by the Crown. His evidence was substantially the same as he had given before Spence J. at the first trial in respect of count 1 and

before Donnelly J. at the second trial in respect of count 2. The record reads:

CROSS-EXAMINATION BY MR. HARTT:

Q. Mr. Scott, you gave evidence at the trial which commenced May 29th last before his lordship Mr. Justice Spence?

A. Yes.

Q. The accused Wright was one of those accused at that time?

A. Yes.

Q. There was also two other accused, a man by the name of McDermott, and Feeley?

A. Yes.

Q. I suggest the evidence you gave at the trial was the evidence you have given us to-day?

A. Yes.

Q. Did you also give evidence last week at a trial?

A. Yes.

Q. In which this man was accused?

A. Yes.

Mr. HARTT: That is all, my lord.

Then Mr. Hartt made the following admissions on behalf of his client:

My Lord, for the purpose of the record in this trial I am prepared to admit that Wright, the accused, contacted the officer Scott and obtained information from him. I am also prepared to make admissions on behalf of my client that we paid money—or money was paid to Scott, and a third admission that we are prepared to make for the purpose of this trial, my lord, that the information was passed on to other persons who had been interested in relation to obtaining this information. However, I do wish to make it perfectly clear that we deny the intent which is an essential ingredient of this charge.

Mr. MILLIGAN: In view of the admissions of my learned friend the Crown closes its case.

Mr. Hartt then applied to Donnelly J. to direct the jury to return a verdict of not guilty on the three counts 3, 4 and 5 on the grounds Wright, having been acquitted under count 1, the matter was *res judicata.*

Donnelly J. gave judgment on the application as follows:

Counsel for Wright in his address to the jury at the trial on the first count in the indictment admitted to the jury that Wright had paid the various sums of money to Scott, the same sums which were related by Scott in his evidence to-day. Counsel also admitted that information was received from Scott by Wright and the sole defence of Wright on that charge as I understand it on checking the address of his counsel was that he did not have the intention to interfere with the administration of justice. Counsel for McDermott in his address contended that McDermott was caught between two police officers who were spying on each other.

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Counsel for Feeley based his defence on the contention that there was no intention on the part of Scott to interfere with the administration of justice, and in fact told the jury that McDermott and Feeley were gamblers, at least one of them was associated with the club at Cooksville, that there had been telephone calls from Wright and Scott to McDermott. The defence of Wright was based on the contention by his counsel that the Crown had not proved the intent on the part of Wright to interfere with the administration of justice. The jury were instructed on the law by the learned trial judge. He outlined the essential elements of the offence as, firstly, the agreement to give money to Scott corruptly, and secondly, the intent that Scott should interfere with the administration of justice.

Considering the addresses by counsel to the jury and the admissions that were made by them in these addresses together with the instruction given by the learned trial judge I must infer that the jury at least came to the conclusion that the Crown had not proven beyond a reasonable doubt that Wright had the intention to interfere with the administration of justice. I fail to see how the verdict of not guilty on the first count in the indictment could have been reached by the jury on any other basis. I must find that the jury trying the first count did find that the Crown had not proven the intention which is an essential element in the three offences with which the accused is charged and on which he is presently on trial.

Will you bring in the jury, please. I consider that I am bound by *Rex v. Quinn,* 10 Canadian Criminal Cases, 412.

His lordship then charged the jury as follows:

Members of the jury, as I informed you very briefly before you retired to your jury room, you are the sole and only judges of the facts, but it is my duty to pass on questions of law. Counsel for the accused has made a motion raising what is known as a plea of res judicata and it is for me to pass on that motion. The three charges against the accused Wright, on which he is presently on trial, are the same except that various amounts of money were paid on different dates. The law in regard to each charge is the same and the essential elements of each charge are the same. The essential elements are, first, that Wright corruptly paid money to Scott. That is admitted. It is also admitted that Scott received money and gave information to Wright that Wright passed on to one or more persons who were interested in receiving that information; second, that Wright had the intention of interfering with the administration of justice, that is an essential element of each of these charges. Wright and others were tried in May and early June, 1961, on a charge that they conspired to commit an indictable offence by corruptly giving money to George Scott, a peace officer of the Ontario Provincial Police Force, the same man who is alleged to have received the money in this present trial, with intent that the said George Scott should interfere with the administration. You see that in that charge the same money was involved and that same intent which is an essential element.

Having read the addresses of counsel to the jury on that trial, the charge which was delivered to the jury by the learned trial judge when he instructed them on the law and reviewed the facts with them, and having considered the verdict of the jury at that trial, I consider that the only inference which I can draw is that at that trial the jury considered that the Crown had not proven beyond a reasonable doubt that Wright had this necessary intention of interfering with the administration of justice. It was a judicial decision on that point and it is not now open to

the Crown to ask you to come to a different verdict on that point. There is the verdict of the earlier jury and as I have said the only inference I can draw from the addresses and the charge to the jury and the verdict is that the Crown failed to prove the necessary intention. That is an essential element in this charge and before the accused may be found guilty the Crown must prove each element of the charge beyond a reasonable doubt. That burden is on the Crown; it is not on the defence. It is my duty to instruct you that it is my view that the jury on the earlier trial considered that the Crown had not proven this essential element. It is therefore my duty to instruct you that you cannot find the accused guilty on these present charges because it is not open to you to arrive at a different verdict than the other jury on this essential element. I would therefore ask that you, without leaving the jury box, select a foreman and if you agree with my instruction to you that you find the accused not guilty on each one of these charges on which he is presently before the Court. Will you select a foreman, please, from among yourselves.

Have you arrived at your verdict?

The FOREMAN: Yes.

The REGISTRAR: Members of the jury, have you agreed upon your verdict? On Counts 3, 4 and 5 as charged in this indictment how do you find the accused as directed by his lordship?

The FOREMAN: My own—the verdict of the jury—I don't know.

HIS LORDSHIP: I had suggested to you that you find the accused not guilty. I had gone further than that; I had instructed you that in my opinion it was impossible for you to arrive at any other verdict.

The FOREMAN: We agree he is not guilty.

HIS LORDSHIP: On each of the counts?

The FOREMAN: On each count.

The situation at this stage of the proceedings may be summarized as follows:

As to count 1: All three appellants had been acquitted.

As to count 2: All three appellants had been convicted.

As to counts 3, 4 and 5: The appellant Wright had been acquitted.

As to count 6: The appellants McDermott and Feeley had entered a plea of guilty and had been fined. This count does not appear further in the proceedings.

The three appellants then appealed to the Court of Appeal for Ontario[1] against their conviction on count 2. The appeal was taken upon the following grounds:

1. That the Learned Trial Judge erred in failing to find that the plea of autrefois acquit was properly pleaded in this case.
2. That the Learned Trial Judge erred in refusing to place the theory of the defence before the jury.
3. That the Learned Trial Judge erred in failing to allow to be placed before the jury the fact of the acquittal of the accused on a previous

[1] [1963] 1 O.R. 571, 38 C.R. 321, 1 C.C.C. 254, 38 D.L.R. (2d) 133.

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charge in so far as it was relevant to the issue to be determined by the jury in this case.

4. That the Learned Trial Judge having found that a previous jury had found that it was not proven beyond a reasonable doubt that the appellant had the intent that George Scott should interfere with the administration of justice erred in failing to direct the jury to return a verdict of not guilty of the conspiracy charge where the facts were admitted to be the same.
5. That the Learned Trial Judge having found that a previous jury had found that it was not proven beyond a reasonable doubt that the appellant had the intent that George Scott should interfere with the administration of justice erred in failing to place this fact before the jury as a relevant consideration in determining whether the appellant was guilty of the conspiracy charged.
6. That the verdict of the jury was inconsistent with a previous verdict on the same facts.
7. Such further and other grounds as Counsel may advise and the Court may deem sufficient grounds of appeal.

The Attorney General for Ontario appealed to the Court of Appeal for Ontario against the acquittal of the appellant Wright on counts 3, 4 and 5 on the ground that: "The learned trial judge erred in law in directing the jury to return a verdict of 'not guilty' on each charge on the ground of res judicata."

These appeals were argued together on September 7, 1962, and judgment was handed down on October 4, 1962. The Court of Appeal dismissed the appeals of the appellants in respect of count 2 and allowed the Crown's appeal in respect of counts 3, 4 and 5 directing that the order of acquittal of the appellant Wright upon those counts be set aside and that there should be a new trial with respect thereto. Schroeder J.A. wrote the judgment in which Laidlaw and Kelly JJ.A. concurred.

The three appellants applied to this Court and were given leave on October 22, 1962, to appeal from the judgment of the Court of Appeal on the following points:

1. Did the Court of Appeal for Ontario err in holding as a matter of law that the learned Trial Judge was correct in holding that the defence of res judicata was not available to the Appellants by reason of their previous acquittal upon count 1 of the indictment?
2. In the alternative, did the Court of Appeal for Ontario err as a matter of law in holding that the learned Trial Judge was correct in not leaving to the Jury for its determination the defence based upon res judicata?
3. Did the Court of Appeal for Ontario err as a matter of law in not holding that the learned Trial Judge has misdirected the Jury when he declined to point out to the Jury that by virtue of the acquittal

of the accused on the first count of the indictment the Jury was precluded from drawing any inferences by way of motive or otherwise on the matter presented to them at the trial on the second count from the supposition or view that the accused had conspired together to interfere corruptly with the administration of justice?

4. Did the Court of Appeal for Ontario err in holding that the plea of autrefois acquit was not properly pleaded in this case?

The appellant Wright appealed to this Court as of right from the order setting aside his acquittal on counts 3, 4 and 5 and directing a new trial.

Although they filed separate factums and were represented by different counsel, all three appellants made common cause in their appeal from conviction under count 2. Wright was alone in the appeal under counts 3, 4 and 5.

Ground of appeal no. 4 dealing with the plea of autrefois acquit may be disposed of under the provisions of ss. 517 and 518 of the *Criminal Code* which read:

517. EVIDENCE OF IDENTITY OF CHARGES. Where an issue, on a plea of autrefois acquit or autrefois convict is tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court pursuant to section 462 on the charge that is pending before that court, are admissible in evidence to prove or to disprove the identity of the charges.

518. (1) WHAT DETERMINES IDENTITY. Where an issue on a plea of autrefois acquit or autrefois convict to a count is tried and it appears

(*a*) that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and

(*b*) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of autrefois acquit or autrefois convict be pleaded,

the judge shall give judgment discharging the accused in respect of that count.

(2) ALLOWANCE OF SPECIAL PLEA IN PART. The following provisions apply where an issue on a plea of autrefois acquit or autrefois convict is tried, namely,

(*a*) where it appears that the accused might on the former trial have been convicted of an offence of which he may be convicted on the count in issue, the judge shall direct that the accused shall not be found guilty of any offence of which he might have been convicted on the former trial, and

(*b*) where it appears that the accused may be convicted on the count in issue of an offence of which he could not have been convicted on the former trial, the accused shall plead guilty or not guilty with respect to that offence.

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These sections appear to be a code of the law relating to the pleas of autrefois acquit and autrefois convict and I am in complete agreement with the views of Schroeder J.A. on this point and do not consider it necessary to review the law on the subject in the light of that judgment. Shortly put, on their trial on count 1 the appellants could not have been convicted on count 2.

In dealing with the defence of *res judicata* as raised in this instance, it is necessary to deal with a preliminary but important question which the appellants urged upon the trial judge, in the Court of Appeal and in this Court, namely, that it was for the jury to decide the issue and that Donnelly J. erred when he refused to admit as an exhibit to go to the jury the complete record of the trial before Spence J. At the beginning of the trial there was some confusion as to what function the jury performed in respect of a plea of *res judicata*. When the question was first raised, Crown counsel took the position that it was a matter for the jury to decide as stated on p. 47:

> If you accept the submission of my learned friend, I submit you yourself would be deciding res judicata, and I submit that is a defence which should be submitted to the jury to decide. I submit if your lordship were simply to impanel a jury and instruct them, you have decided it is res judicata and therefore they must not convict, you are really treating the res judicata as a special plea, but doing it indirectly and I submit your lordship should not do that on the issue of res judicata because that is something for the jury to decide.

Donnelly J. did not then decide the point but did hold that *res judicata* was not a special plea and that it is a defence included in a plea of not guilty. There the matter rested until at the conclusion of the Crown's case when Mr. Hartt again asked that the record of the first trial be received in evidence to go to the jury. Donnelly J. refused the application but ordered the record to be filed but not to be available to the jury. He further held that the question as to whether the defence of *res judicata* had been made out was one of law for him to decide and was not a question for the jury. He thereupon ruled that the defence of *res judicata* had not been established.

While there are findings of fact involved in determining whether or not the defence of *res judicata* has been made out in any given case, it is manifest that it would be unrealistic to hand over to a jury the record of a previous

trial or to have read to the jury that record which in any specific case might contain evidence inadmissible in the second trial and prejudicial to the accused. On balance, therefore, justice requires that a workable rule consistent with safeguarding the rights of accused persons be formulated and in that regard I think the procedure followed by Donnelly J. is the only reasonable course to follow and which should be followed in the future. It will be for the judge to decide as a matter of law whether the defence of *res judicata* has been made out. The case of *Cowan v. Affie*[1] was cited in support of the position taken by Mr. Hartt and agreed to initially by Crown counsel. For the reasons just stated I do not think that *Cowan v. Affie, supra,* ought to be followed.

The appellants urge that the defence of *res judicata* was available to them and that Donnelly J. and the Court of Appeal were in error in holding that it had not been established.

The defence of *res judicata* differs materially from autrefois acquit or autrefois convict. The principle of *res judicata* estops the Crown in a second or later legal proceeding from questioning that which was in substance the ratio of and fundamental to the decision in the earlier proceeding. *Res judicata* is applicable in criminal as well as civil proceedings. This was aptly stated by Holmes J. in *United States v. Oppenheimer*[2] when he said:

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

and by Lord MacDermott in *Sambasivam v. Public Prosecutor*[3] in the following passage:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings.

This principle was adopted by this Court in *McDonald v. The Queen*[4] in both the majority and minority opinions.

[1] (1893), 24 O.R. 358.
[2] (1916), 242 U.S. 85 at 87.
[3] [1950] A.C. 458 at 479.
[4] [1960] S.C.R. 186, 32 C.R. 101, 126 C.C.C. 1.

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In view of the reference by Schroeder J.A. to *Rex v. Bayn*[1], it must now be said that the statement by Haultain C.J.S. in *Bayn* at p. 90:

> . . . that there is no rule or principle of the common law, or of the statutory law, on which the principle of *res judicata* is applicable to criminal cases, which is not founded on the maxims *nemo debet bis vexari pro una et eadem causa* or *nemo debet bis puniri pro uno delicto.*

is not good law.

Accordingly, what was in substance the ratio of and fundamental to the verdict of acquittal on count 1 before Spence J.? Count 1 and count 2 read:

1. *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT B. FEELEY,* between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario did unlawfully agree and conspire together to commit an indictable offence under Section 101(*b*) of the Criminal Code of Canada by corruptly giving money to George Scott a peace officer of the Ontario Provincial Police Force, with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 408(1)(*d*).
2. AND FURTHER THAT the said *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT BERNARD FEELEY* between the first day of January, 1960 and the first day of July, 1960, in the Province of Ontario did unlawfully agree and conspire together to effect an unlawful purpose, to wit: to obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408(2).

They are not identical in their essential elements and for that reason the defence of autrefois acquit was not made out but the appellants argue that though differing in language and in their essential elements they do in reality deal with the same offence and that the basic error made by Donnelly J. at the trial and by Schroeder J.A. was that they approached consideration of the case from the standpoint of a comparison of the wording of the two counts and not the realities of the proceedings before Spence J.

The question really boils down to whether there were in fact two conspiracies or only one. The appellants argue that what the Crown has done is to make two conspiracies out of the one agreement testified to by Constable Scott by splitting off from the agreement alleged in count 1 a segment and calling it count 2. Accordingly, were there one or two unlawful agreements or conspiracies? Constable Scott's evidence at the two trials was almost identical.

[1] [1932] 3 W.W.R. 113, [1933] 1 D.L.R. 497, 59 C.C.C. 89.

Before Spence J. he testified as to the agreement with Wright in a series of interviews and telephone conversations deposed to from p. 176 to p. 202 of the record culminating in Scott's statement on pp. 201-202:

A. Well, Wright said that starting February 15th, he would call me every evening from Belleville between 6.30 and 7.00 p.m.

Q. And did he give you the name of his alleged contact or the gambler at that time?

A. No, sir, he didn't.

Q. And what conversation, if any, was there about disclosing the names of the contacts to you?

A. Well, Wright told me that as we developed the trust between us, I would be given much information regarding gambling activities in the Province.

Q. Any further discussion at this time?

A. Yes, sir. He again emphasized that the gamblers were only interested in the policy of the Branch towards the Clubs and the time of any raids on the Clubs. He said the only way we could get caught was if one turned the other in. We talked of using a code for our telephone conversations and we decided that we would call the Vets Club north and the Ramsey Club south. Wright said he thought the gamblers should pay the cost of all the long distance telephone calls. He also told me that he thought we could get more money in time to come. It was on this date that I agreed to go along with Wright; that is, I should say accept his proposition as he put it to me.

The proposition which Scott has described is at pp. 177-179:

Q. Apart from any personal conversation, was there any conversation with Wright on this occasion about any proposition?

A. Yes, sir, there was.

Q. Yes; what was said?

A. Well, Wright told me that he had stopped a car for speeding in the Belleville area about two weeks ago. Wright said the driver of this car turned out to be one of the gamblers from Toronto. He said that the gambler was surprised to see him in uniform and put a proposition to him. This proposition was that myself, as an officer on the Anti-Gambling Branch, would find out, or knowing our policies for dates of raids respecting two Clubs operating in the Province, would forward the information regarding policies and raids and dates of raids, I should say, to Wright in Belleville, who in turn would forward the information to the gambler in Toronto. Now, for doing this—providing this information, Wright said that we could obtain—

Q. Who is "we"?

A. Wright and myself.

Q. Yes?

A. —$200 each per month. He said that the gambler was only interested in raids on two Clubs and the policies of the Provincial Police

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towards these two Clubs. Wright said he had been given a number to call in Toronto and he could certify the figure of $200 each per month. When Wright made this approach to me I showed some surprise and laughed at him, but I said, "Well, go ahead and make the phone call." And Wright went to a pay phone located in the beverage room in the Wallace Hotel and he appeared to dial a number and carry on a conversation. He completed the apparent phone call and returned to our table. And he told me, "That is right, we can make $200 each."

Q. Did you ask him who the gambler or contact was, at that time?

A. I did, sir.

Q. And did he tell you at that time?

A. He did not, sir.

Q. What else, if anything, was discussed with Wright at this time with reference to this proposition of his?

A. Well, Wright stated that this information was required only to protect the clientele frequenting the Clubs in that they get—they had big shots as customers in the Clubs. He told me that this would not interfere with my duties and mentioned to me how few raids there were in the past five years.

Q. You refer to Wright telling you of the information required about two gaming clubs. Did he at this time make—identify them by name?

A. Well, he identified the Vets Club which was located in Cooksville.

Q. Yes; and does that cover substantially the conversation you had with Wright at this time—what did you tell him about the proposition?

A. Well, I might say also that Wright said if I agreed to this proposition we would have a meeting with his contact.

Q. Yes; what did you tell him?

A. I told Wright that I would like some time to think it over.

Q. Yes; and then did you and he leave the hotel and you went home?

A. Yes, sir, we did.

Then at the second trial before Donnelly J., Scott testified as to the agreement as appears on pp. 276 to 278 in language almost identical to his testimony on pp. 176 to 179, culminating again in Scott's statement at pp. 312 and 313 that he "would be part of this scheme".

No matter how Scott's evidence at the two trials is scrutinized, there is no escaping that he and Wright entered into only one agreement or proposition and that was as Scott described it at the first trial as set out above and at the second trial as:

A. Wright explained that the gambler told him that if I did inform Wright of the dates of raids on these two social clubs and the policy of the Provincial Police with regard to the clubs, and Wright in turn forwarded it to the gambler we would each be reimbursed in what he figured would be two hundred dollars each per month. He explained that the situation would be handled in this way:—Upon

> my finding out that any of the two clubs would be raided I would telephone him, Wright, at Belleville and give him the information and he in turn would phone back to Toronto the information. He explained that—he mentioned how few raids had been made on the clubs in the past five years, saying that it wouldn't hinder my work at all and the big reason that this information was required was to protect people of reputable standing from being caught in the clubs on a police raid. He wouldn't name the person with whom he had dealt and he said he had been given a Toronto telephone number and he could phone this number and certify this amount for two hundred dollars each per month. Now, at this time I laughed a bit and said well, he might as well call the number. He went to a pay 'phone in the hotel and appeared to dial a number and appeared to carry on a conversation at the telephone. A couple of minutes later he came back to the table and said that that was correct, that we could make the amount of two hundred dollars a month each for this information. I told Wright I wasn't too keen; I would like some time to think about this matter at this time.

The conspirators (if there was a conspiracy) did not agree together just to obtain from Constable Scott information which it was his duty not to divulge—they were not interested in just getting information or just in having Scott give information unlawfully—they wanted the information so as to be forewarned of impending raids on their gambling clubs. That was the conspiracy, if any.

Therefore, everything that could be considered unlawful under count 2 was part and parcel of the agreement under count 1. There was only one agreement deposed to and it cannot be severed arbitrarily at some point by the Crown so as to create the illusion of two offences from what is in fact only one.

The verdict of not guilty under count 1, however unpalatable to the Crown, was a lawful verdict which has not been challenged upon appeal. That verdict dealt with the realities of the crime these appellants were charged with having committed. The Crown is now estopped from questioning that which was (in fact and law) the ratio of and fundamental to the decision in the first trial.

Crown counsel must have considered the two counts as covering the same offence. This is evident from the similarity of counsel's opening statement on count 1 before Spence J. as follows:

> In January, 1960, the Provincial Police transferred the accused Wright to other duties in the Force in Belleville, not associated with the anti-gambling unit. At that time Scott then became the second senior constable under Sergeant Anderson.

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In February 1960, something like a month following Wright's transfer, it is alleged that Wright came to see Scott and told him a story about stopping a Toronto gambler for speeding. He told Scott the gambler had offered to pay $400 a month to get information about the policy of the anti-gambling unit and the times of raids. Wright told Scott that here was a chance to make some easy money. Scott told Wright that he would have to think this over, arranged to meet him or talk to him later. He immediately reported the incident to his superiors and was instructed to go along with Wright.

Scott then agreed with Wright to tip him off on raids as requested and supply what information he could. Wright told him that the information that the gamblers or his (Wright's) contacts wanted was as to raids on what was popularly referred to as the Vets Club at Cooksville and a new Ramsey Club in Niagara Falls. Those were apparently the two main alleged gaming houses or clubs then known to be operating in Ontario.

when compared to Crown counsel's opening before Donnelly J. previously quoted.

The one conspiracy view is further strengthened by the similarity of the language used by Spence J. in his charge to the jury relating to count 1 and Donnelly J.'s charge as to count 2.

Spence J. said at pp. 1261-2 of the record of the first trial:

So what the Crown has here charged, put in short words, is that Wright, McDermott and Feeley did agree and conspire together corruptly to give money to Scott, with intent that Scott should interefere with the administration of justice.

The essential elements of the offence charged are these. Firstly, the agreement to give money to Scott corruptly; secondly, the intent that Scott should interfere with the administration of justice.

The offence is complete with the agreement, the arriving at the agreement or design. That design need not be carried out, as the agreement to do the unlawful act is the offence.

and at pp. 1280-1:

Much of the evidence dealt with the character of these so-called social clubs, the Centre Road Veterans Club and the Ramsey Club, and with those who were in control there. That evidence is relevant only to show, if it does show, that the accused McDermott and Feeley had an interest in the protection of those places from police interference, and therefore an interest in making the illegal conspiracy with Wright with which they are charged in this charge. It is relevant only for that purpose. Even if you are convinced that both of those clubs are illegal gaming houses, it is not sufficient. You must be convinced beyond reasonable doubt that, with the intent to protect them and thus interfere with the administration of justice, the two men agreed to pay Scott money corruptly.

Donnelly J. dealt with count 2 in his charge as follows at pp. 1144-5 of the record of the second trial:

This indictment covers a period between January 1st, 1960 and July 1st, 1960. It is not necessary to show that the accused conspired over this whole

period, as long as they conspired at any one time during that period. The conspiracy does not need to cover the whole period. The evidence is that Scott first contacted Wright about February 5th and that Wright was arrested on the 28th of May. You do not have to find that the parties conspired over that whole period; all the Crown has to show is that sometime in the period the three parties were active in the common design—associated in a common design for a common unlawful purpose.

Now I propose to review the evidence with you in regard to the parties individually. The accused Wright, as you have been told, was a member of the Ontario Provincial Police, and was a member of the Anti-gambling Squad for some years, Scott being a member of that squad or branch during a number of years also. The evidence indicates that Wright was on the Branch before Scott, and in January, 1960, Wright was transferred to Belleville. Scott's evidence was that on the 5th of February Wright came to his house and after some conversation they went to the Wallace Hotel or some hotel and Scott was told by Wright about some man who had been stopped on the highway by Wright and it turned out he was interested in gambling and that he was interested in obtaining information as to the policy of the Anti-gambling Branch and the times when raids would be made on one or more clubs. Wright told Scott, according to Scott, that if this information was given each of them would receive two hundred dollars a month. Wright and Scott parted after Scott had told Wright that he wanted to think it over. There were subsequent conversations, one or two, very shortly after, in one of which Scott told Wright that he would be a party to the proposition which Wright had made . . . .

I am, accordingly, of opinion that Donnelly J. should have held that *res judicata* had been established and he should have directed the jury to acquit the appellants under count 2. The convictions will, therefore, be set aside and the appellants acquitted.

That still leaves Wright's appeal from the judgment of the Court of Appeal setting aside his acquittal by Donnelly J. on counts 3, 4 and 5 and directing a new trial.

I agree with Schroeder J.A. that as to these counts charging as they do the commission of substantive offences the Crown was not estopped by Wright's acquittal under count 1 from proceeding to try Wright for the substantive offences: *McDonald v. The Queen*[1], *per* Martland J.

That does not, however, dispose of the matter because Wright contends and in my opinion correctly that his acquittal under count 1 negatives the essentially criminal element of the charges, namely, that the various sums of money were given corruptly to Constable Scott "with intent that the said George Scott should interfere with the administration of justice . . . ." and that if the charges

[1] [1960] S.C.R. 186 at 194-195, 32 C.R. 101, 126 C.C.C. 1.

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under counts 3, 4 and 5 are to be let go to the jury the trial judge will be obliged to charge the jury in the light of the admissions made on behalf of Wright before Spence J. that in view of Wright's acquittal on count 1 it would not be open to them to find that the money which Wright admitted having given Scott was given with intent to interfere with the administration of justice. Such being the case in lieu of upholding the direction for a new trial which must necessarily result in an acquittal, this Court should allow the appeal as to counts 3, 4 and 5 and acquit Wright on these charges.

Appeals dismissed, Cartwright *and* Hall JJ. *dissenting.*

Solicitor for the appellant Wright: E. P. Hartt, Toronto.

Solicitor for the appellant McDermott: D. G. Humphrey, Toronto.

Solicitor for the appellant Feeley: J. Sedgwick, Toronto.

Solicitor for the respondent: R. P. Milligan, Cornwall.

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*June 18, 19, 20 Dec. 16

THE ATTORNEY-GENERAL FOR ONTARIO ..... APPELLANT;

AND

BARFRIED ENTERPRISES LTD. .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Unconscionable transactions relief legislation—Whether intra vires of provincial Legislature—The Unconscionable Transations Relief Act, R.S.O. 1960, c. 410—Interest Act, R.S.C. 1952, c. 156, s. 2—British North America Act, s. 91 (19).

An applicant for relief under *The Unconscionable Transactions Relief Act,* R.S.O. 1960, c. 410, applied to have revised a certain mortgage transaction with the respondent lender. The mortgage was for a face amount of $2,250 with interest at 7 per cent per annum. The sum actually advanced was $1,500 less a commission of $67.50. The difference between the $1,500 and the face amount of $2,250 was made up of a bonus and other charges. The County Court judge set aside the mortgage in part and revised it to provide for payment of a principal sum of $1,500 with interest at 11 per cent per annum. No constitutional issue was raised before him.

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Martland, Judson, Ritchie and Hall JJ.

The respondent raised this issue for the first time in the Court of Appeal. That Court did not hear argument upon the merits and the right of counsel to make submissions thereon was reserved in case *The Unconscionable Transactions Relief Act* should be held to be *intra vires* of the legislature. Similarly in this Court the merits were not discussed.

The Act empowers the Court to grant specified relief in respect of money lent where it finds that the "cost of the loan" is excessive and the transaction harsh and unconscionable. "Cost of the loan" is defined to mean, among other things, "the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges". It was held by the Court of Appeal to be legislation in relation to interest, its essential purpose being to afford a remedy to a borrower to have the contract of loan modified, by having interest, "in the broad sense of the term as compensation for the loan", reduced. The Court also held that the Act was in direct conflict with s. 2 of the *Interest Act*, R.S.C. 1952, c. 156.

On appeal to this Court it was submitted: (a) that the Act is legislation in relation to a matter coming within s. 92(13) of the *British North America Act*, Property and Civil Rights in the Province, the subject-matter being rescission and reformation of a contract of loan under the conditions defined by the Act; (b) that in so far as the Act affects any matter coming within the classes of subjects assigned by the *British North America Act* to the exclusive legislative authority of the Parliament of Canada, it does so only incidentally; (c) that there is no conflict or repugnancy between the provisions of the Act and any validly enacted federal legislation.

Held (Martland and Ritchie JJ. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Cartwright, Fauteux, Judson and Hall JJ.: Submissions (a), (b) and (c) are well founded and the Act is within the power of the provincial Legislature. It is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, namely (a) that the cost of the loan is excessive, and (b) that the transaction is harsh and unconscionable. The wording of the statute indicates that it is not the rate or amount of interest which is the concern of the legislation but whether the transaction as a whole is one which it would be proper to maintain as having been freely consented to by the debtor.

There was error in the judgment of the Court below in following *Singer v. Goldhar* (1924), 55 O.L.R. 267, in holding that interest in the wide sense includes bonus instead of following subsequent cases which overrule it.

Reference re Saskatchewan Farm Security Act, 1944, s. 6, [1947] S.C.R. 394, (affirmed, [1949] A.C. 110); *Lethbridge Northern Irrigation District v. I.O.F.*, [1949] A.C. 513, distinguished; *Asconi Building Corporation v. Vocisano*, [1947] S.C.R. 358; *Day v. Victoria* [1938] 3 W.W.R. 161; *Ladore v. Bennett*, [1939] A.C. 468, referred to.

Per Cartwright J.: *The Unconscionable Transactions Relief Act* is legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province rather than legislation in relation to Interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of interest specified in head 19 of s. 91 of the *British North America Act*.

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Per Martland and Ritchie JJ., *dissenting*: The power of a court, which has jurisdiction in an action for the recovery of a debt, to act under *The Unconscionable Transactions Relief Act* arises only if it has found that the cost of the loan is excessive. It must also find the transaction to be harsh and unconscionable, but it may happen, as it did in the present case, that the judge who hears the case decides that the transaction is harsh and unconscionable because of the excessive cost of the loan. The result is that the very court to which a creditor must resort in order to enforce payment of the interest or discount which the *Interest Act* says he may exact is, by the provincial legislation, empowered to decide whether that interest or discount is, in all the circumstances, excessive. Furthermore, if that court decides that it is excessive and that the transaction is harsh and unconscionable, it may relieve the debtor of the obligation of paying that portion of his obligation which it considers to be excessive, and thus is in a position to relieve him from the payment of an obligation which the Parliament of Canada has stated the creditor is entitled to exact from him. In these circumstances there is a direct conflict between the two statutes and, that being so, the legislation of the Canadian Parliament, validly enacted, must prevail.

Lethbridge Northern Irrigation District v. I.O.F., supra; Attorney-General for Canada v. Attorney-General for British Columbia, [1930] A.C. 111, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], which reversed an order of Clark Co. Ct. J., and declared the Ontario *Unconscionable Transactions Relief Act* to be unconstitutional. Appeal allowed, Martland and Ritchie JJ. dissenting.

E. R. Pepper, Q.C., for the appellant.

B. Sischy, for the respondent.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the intervenant, Attorney General of Canada.

G. LeDain, and *J. H. Lafleur*, for the Attorney-General of Quebec.

The judgment of Taschereau C.J. and of Fauteux, Judson and Hall JJ. was delivered by

JUDSON J.:—The Attorney-General for Ontario appeals from a judgment of the Ontario Court of Appeal[1] which declared *The Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410, to be unconstitutional. The Attorney-General for Quebec has intervened and supports the appeal. No other province is represented. The appeal is opposed by

[1] [1962] O.R. 1103, 35 D.L.R. (2d) 449.

Barfried Enterprises Ltd., the lender under the impugned transaction, and by the Attorney General of Canada.

One Ralph Douglas Sampson, the borrower, applied in the County Court of the County of Wellington to have revised a certain mortgage transaction with the respondent Barfried. The mortgage is dated September 3, 1959, and was for a face amount of $2,250 with interest at 7 per cent per annum. The sum actually advanced was $1,500 less a commission of $67.50. The difference between the $1,500 and the face amount of $2,250 was made up of a bonus and other charges. The County Judge set aside the mortgage in part and revised it to provide for payment of a principal sum of $1,500 with interest at 11 per cent per annum. No constitutional issue was raised before him.

Barfried raised this issue for the first time in the Court of Appeal. Briefly, *The Unconscionable Transactions Relief Act* empowers the Court to grant specified relief in respect of money lent where it finds that the "cost of the loan" is excessive and the transaction harsh and unconscionable. "Cost of the loan" is defined in the Act to mean, among other things, "the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges." This was held by the Court of Appeal to be legislation in relation to interest, its essential purpose being to afford a remedy to a borrower to have the contract of loan modified, by having interest, "in the broad sense of the term as compensation for the loan", reduced. The Court also held that the Act was in direct conflict with s. 2 of the *Interest Act*, R.S.C. 1952, c. 156.

The essence of the judgment appealed from is contained in the following passage from the reasons for judgment of the Court of Appeal:

> The statute is applicable to only one kind of contract—a money-lending contract. Its essential purpose and object is to provide a remedy to a borrower to enable him to have the terms of such a contract modified. The end result of an application to the Court in accordance with its provisions, if the borrower is entitled to succeed, must be that the interest in the broad sense of that term, payable as compensation for the loan will be reduced. It matters not, in my opinion, whether this result is achieved through the intervention of a Court order or through the operation of a provision in the Act itself fixing a stated rate or scale of interest. In either case it is unquestionably legislation in relation to interest under the pith and substance rule, and, in my opinion, clearly invalid as an infringement of the exclusive legislative power committed to Parliament. Moreover it is

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in direct conflict with the provisions of s. 2 of the Interest Act, R.S.C. 1952, c. 156. Accordingly, it is beyond the province's legislative competence to enact.

Both provinces submit common grounds of error:

(a) That the Act is legislation in relation to a matter coming within s. 92(13) of the *British North America Act,* Property and Civil Rights in the Province, the subject-matter being rescission and reformation of a contract of loan under the conditions defined by the Act;

(b) That in so far as the Act affects any matter coming within the Classes of Subjects assigned by the *British North America Act* to the exclusive legislative authority of the Parliament of Canada, it does so only incidentally;

(c) That there is no conflict or repugnancy between the provisions of the Act and any validly enacted federal legislation.

The powers of the Court are stated in s. 2 of the Act, which reads:

> 2. Where in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may,
>
> (*a*) re-open the transaction and take an account between the creditor and the debtor;
>
> (*b*) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;
>
> (*c*) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;
>
> (*d*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor.

The terms "money lent" and "cost of the loan" are defined as follows:

> "Money lent" includes money advanced on account of any person in any transaction that, whatever its form may be, is substantially one of money-lending or securing the repayment of money so advanced and includes and has always included a mortgage within the meaning of *The Mortgages Act,* R.S.O. 1950, c. 402, s. 1; 1960, c. 127, s. 1.

"Cost of the loan" means the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges, but not actual lawful and necessary disbursements made to a registrar of deeds, a master or local master of titles, a clerk of a county or district court, a sheriff or a treasurer of a municipality.

In my opinion all these submissions are well founded and the Act is within the power of the provincial Legislature. The foundation for the judgment under appeal is to be found in the adoption of a wide definition of the subject-matter of interest used in the *Saskatchewan Farm Security Act* reference[1]. The judgment of this Court is that case was affirmed in the Privy Council[2]. Interest was defined:

> In general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another.

This is substantially the definition running through the three editions of Halsbury. However, in the third edition (27 Hals., 3rd. ed., p. 7) the text continues:

> Interest accrues *de die in diem* even if payable only at intervals, and is, therefore, apportionable in point of time between persons entitled in succession to the principal.

The day-to-day accrual of interest seems to me to be an essential characteristic. All the other items mentioned in *The Unconscionable Transactions Relief Act* except discount lack this characteristic. They are not interest. In most of these unconscionable schemes of lending the vice is in the bonus.

In the cases decided in this Court under s. 6 of the *Interest Act,* it is settled that a bonus is not interest for the purpose of determining whether there has been compliance with the Act. Section 6 reads:

> . . . whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended . . . , no interest whatever shall be . . . recoverable . . . , unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

[1] [1947] S.C.R. 394 at 411, 3 D.L.R. 689.
[2] [1949] A.C. 110, 1 W.W.R. 742, 2 D.L.R 145.

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Schroeder J.A. cited *Singer v. Goldhar*[1], as defining interest in wide terms. In *Singer v. Goldhar* there was no provision for interest in the mortgage but there was a very big bonus. The Court of Appeal held that this infringed s. 6 of the *Interest Act*, the bonus being the same thing as interest. But in *Asconi Building Corporation v. Vocisano*[2], Kerwin J. pointed out that *London Loan and Savings Co. of Canada v. Meagher*[3], had overruled *Singer v. Goldhar*. It is now established that in considering s. 6 of the *Interest Act*, a bonus is not interest and the fact that interest may be payable on a total sum which includes a bonus does not involve an infringement of s. 6 of the Act. This was recognized in all the reasons delivered in the *Asconi* case. It was in this context that the wide definition of interest above referred to was used in the *Saskatchewan Reference* case. The Court held that the subject-matter of the legislation was interest and that to call it a reduction of principal did not change its character.

There is, therefore, error in the judgment of Schroeder J.A. in following *Singer v. Goldhar* in holding that interest in the wide sense includes bonus instead of following the subsequent cases which overrule it.

The *Lethbridge Northern Irrigation* case[4] and the *Saskatchewan Farm Security* case[5], do not govern the present case. In the first of these cases, provincial legislation reduced the rate of interest on provincial debentures or provincially-guaranteed debentures. This legislation was concerned with interest in its simplest sense and nothing more and was held to be *ultra vires*.

The *Saskatchewan Farm Security* case was treated as being on the same subject or matter. Legislation which provided that in case of crop failure as defined by the Act, the principal obligation of the mortgagor or purchaser of a farm should be reduced by 4 per cent in that year but that interest should continue to be payable as if the principal had not been reduced, was held to be legislation in relation to interest.

[1] (1924), 55 O.L.R. 267, [1924] 2 D.L.R. 141.
[2] [1947] S.C.R. 358 at 365.
[3] [1930] S.C.R. 378, 2 D.L.R. 849.
[4] [1940] A.C. 513, 1 W.W.R. 502, 2 D.L.R. 273.
[5] [1947] S.C.R. 394, 3 D.L.R. 689.

Day v. Victoria[1] and *Ladore v. Bennett*[2] come much closer to the present problem. In *Day v. Victoria,* legislation altering the rate of interest of municipal debentures was held to be incidental to a recasting of the city debt structure and was within the competence of the province under s. 92(8) "Municipal Institutions in the Province", and s. 92(13) "Property and Civil Rights in the Province." In *Ladore v. Bennett* a reduction in the rate of interest on municipal debentures was incidental to an amalgamation of four municipalities and a consolidation of their separate indebtedness and the issue by the new municipality of its own debentures in place of the old but at a reduced rate of interest.

The issue in this appeal is to determine the true nature and character of the Act in question and, in particular, of s. 2 above quoted. The Act deals with rights arising from contract and is *prima facie* legislation in relation to civil rights and, as such, within the exclusive jurisdiction of the province under s. 92(13). Is it removed from the exclusive provincial legislative jurisdiction by s. 91(19) of the Act, which assigns jurisdiction over interest to the federal authority? In my opinion, it is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, namely, (a) that the cost of the loan is excessive, and (b) that the transaction is harsh and unconscionable. The wording of the statute indicates that it is not the rate or amount of interest which is the concern of the legislation but whether the transaction as a whole is one which it would be proper to maintain as having been freely consented to by the debtor. If one looks at it from the point of view of English law it might be classified as an extension of the doctrine of undue influence. As pointed out by the Attorney-General for Quebec, if one looks at it from the point of view of the civil law, it can be classified as an extension of the doctrine of lesion dealt with in articles 1001 to 1012 of the *Civil Code.* The theory of the legislation is that the Court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent. The fact that interference with such a

[1] [1938] 3 W.W.R. 161, 53 B.C.R. 140, 4 D.L.R. 345.
[2] [1939] A.C. 468, 2 W.W.R. 566, 3 D.L.R. 1.

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contract may involve interference with interest as one of the constituent elements of the contract is incidental. The legislature considered this type of contract as one calling for its interference because of the vulnerability of the contract as having been imposed on one party by extreme economic necessity. The Court in a proper case is enabled to set aside the contract, rewrite it and impose the new terms.

This legislation raises the very case which the Privy Council refrained from deciding in the *Saskatchewan Farm Security* case when it said, at p. 126:

> Their Lordships are not called on to discuss, and do not pronounce on, a case where a provincial enactment renders null and void the whole contract to repay money with interest. Here the contracts survive, and once the conclusion is reached that, as Kerwin J. said, "the legislation here in question is definitely in relation to interest," reliance on such a decision as *Ladore v. Bennett* is misplaced.

Under the Ontario statute an exercise of judicial power necessarily involves the nullity or setting aside of the contract and the substitution of a new contractual obligation based upon what the Court deems it reasonable to write within the statutory limitations. Legislation such as this should not be characterized as legislation in relation to interest. I would hold that it was validly enacted, that no question of conflict arises.

I would therefore reverse the order of the Court of Appeal for Ontario and hold that the *Unconscionable Transactions Relief Act* is within the powers of the Legislature of the Province of Ontario. The record should be referred to the Court of Appeal to be dealt with on the merits. There should be no order as to costs in this Court.

CARTWRIGHT J.:—The constitutional question raised on this appeal and the relevant statutory provisions are set out in the reasons of other members of the Court.

The facts with which the learned County Court Judge had to deal may be briefly stated. The applicant for relief under *The Unconscionable Transactions Relief Act,* one Ralph Douglas Sampson, had executed a first mortgage to Barfried Enterprises Ltd., dated September 3, 1959, under

the terms of which he was obligated to pay $2,250 with interest at 7 per cent per annum as follows:

> The sum of Twenty-five ($25.00) Dollars shall become due and payable on the 1st day of October, 1959 and on the 1st day of each and every month thereafter up to and including the 1st day of August, 1964.
>
> The aforesaid monthly payments shall be applied firstly in payment of interest computed from the 1st day of September, 1959 and calculated half-yearly not in advance as well after as before maturity and both before and after default on the 1st days of March and September in each year until the mortgage is fully paid, and secondly in reduction of principal.
>
> The balance of the said principal sum together with interest as aforesaid shall become due and payable on the 1st day of September, 1964.

The amount actually advanced to Sampson was $1,432.50; the difference between this amount and the $2,250 being made up of a bonus of $750 and a commission of $67.50. Both of these items would form part of the "cost of the loan" as defined in s.1(a) of *The Unconscionable Transactions Relief Act*. For the reasons given by my brother Judson I am of opinion that neither of these items is "interest", within the meaning of that term as used in the *Interest Act*, R.S.C. 1952, c. 156. If, contrary to this view, the bonus and commission should be held to be interest then it would seem that s. 6 of the *Interest Act* would prevent the mortgagee from recovering any interest. That section reads as follows:

> 6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The Unconscionable Transactions Relief Act appears to me to be legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province, rather than legislation in relation to Interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of Interest specified in head 19 of s. 91 of the *British North America Act*. For this reason and for the reasons given by my brother Judson I agree with his conclusion that *The*

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Unconscionable Transactions Relief Act is not *ultra vires* of the Legislature of Ontario.

Particular cases may arise in which the provisions of the Provincial Act will come into conflict with those of the Dominion Act. In such cases the Dominion Act will of course prevail. The case at bar does not appear to me to be such a case. It has not been suggested that the applicant could have obtained any relief from a bargain to pay interest at 7 per cent on the amount actually advanced to him. It is of the items other than interest making up the "cost of the loan" that complaint is made.

In the reasons of the Court of Appeal it is stated that the Court did not hear argument upon the merits and that the right of counsel to make submissions thereon was reserved in case the Act should be held to be *intra vires* of the legislature. Similarly in this Court the merits were not discussed.

I would set aside the order of the Court of Appeal and direct that the record should be returned to that Court to deal with the merits. There should be no order as to costs in this Court.

The judgment of Martland and Ritchie JJ was delivered by

MARTLAND J. (*dissenting*):—The question in issue in this appeal is as to the constitutional validity of *The Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410, the relevant portions of which provide as follows:

1. In this Act,

(*a*) "cost of the loan" means the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges, but not actual lawful and necessary disbursements made to a registrar of deeds, a master or local master of titles, a clerk of a county or district court, a sheriff or a treasurer of a municipality;

(*b*) "court" means a court having jurisdiction in an action for the recovery of a debt or money demand to the amount claimed by a creditor in respect of money lent;

(*c*) "creditor" includes the person advancing money lent and the assignee of any claim arising or security given in respect of money lent;

(*d*) "debtor" means a person to whom or on whose account money lent is advanced and includes every surety and endorser or other person liable for the repayment of money lent or upon any agreement or collateral or other security given in respect thereof;

(*e*) "money lent" includes money advanced on account of any person in any transaction that, whatever its form may be, is substantially one of money-lending or securing the repayment of money so advanced and includes and has always included a mortgage within the meaning of *The Mortgages Act*.

2. Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may,

(*a*) re-open the transaction and take an account between the creditor and the debtor;

(*b*) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;

(*c*) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;

(*d*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor.

The Court of Appeal of Ontario, before which the issue as to the constitutionality of this enactment was first raised, held unanimously that it was *ultra vires* of the Legislature of the Province of Ontario. Schroeder J.A., who delivered the judgment of the Court, said:

> The statute is applicable to only one kind of contract—a money-lending contract. Its essential purpose and object is to provide a remedy to a borrower to enable him to have the terms of such a contract modified. The end result of an application to the Court in accordance with its provisions, if the borrower is entitled to succeed, must be that the interest in the broad sense of that term, payable as compensation for the loan will be reduced. It matters not, in my opinion, whether this result is achieved through the intervention of a Court order or through the operation of a provision in the Act itself fixing a stated rate or scale of interest. In either case it is unquestionably legislation in relation to interest under the pith and substance rule, and, in my opinion, clearly invalid as an infringement of the exclusive legislative power committed to Parliament. Moreover it is in direct conflict with the provisions of s. 2 of the Interest Act, R.S.C. 1952, c. 156. Accordingly, it is beyond the province's legislative competence to enact. Since, therefore, the learned Judge was without jurisdiction to pronounce the Order in appeal, that order is without effect and must be quashed: *Display Service Ltd. v. Victoria Medical Building Ltd.*, [1958] O.R. 759 at p. 763.

It is the contention of the appellant, the Attorney-General for Ontario, supported by the intervenant, the Attorney-General of Quebec, that this legislation is within the jurisdiction of the Province to enact, under subss. 13

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and 16 of s. 92 of the *British North America Act*, as relating to Property and Civil Rights in the Province and to Matters of a merely local or private Nature in the Province.

Whether or not this contention could be maintained successfully, in the absence of legislation by the Parliament of Canada in the same field, it is unnecessary for me to consider, since I have reached the conclusion that the provisions of the Act under consideration come into conflict directly with the provisions of s. 2 of the *Interest Act*, R.S.C. 1952, c. 156, which provides as follows:

> 2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount that is agreed upon.

That the validity of the provisions of the *Interest Act*, under s. 91(19) of the *British North America Act*, is unquestionable was stated by Viscount Caldecote L.C. in *Board of Trustees of the Lethbridge Northern Irrigation District v. Independent Order of Foresters*[1]. Section 2 of that Act, above quoted, provides that, except as provided by that Act or any other Act of the Parliament of Canada, a person may not only stipulate for any rate of interest or discount that is agreed upon, but may exact the same. Parliament has, therefore, given to a creditor, who has agreed with his debtor upon a rate of interest or discount, the legal right to demand and to enforce payment of the same.

As Schroeder J.A. has pointed out in the passage from his judgment previously quoted, the Ontario statute applies only to money-lending contracts. It defines "cost of the loan" as including interest and discount. It purports to confer upon a Court, which has jurisdiction in an action for the recovery of a debt, the power, if it finds the cost of the loan to be excessive and the transaction to be harsh and unconscionable, to reopen the transaction and to relieve the debtor from payment of any sum in excess of the sum which it adjudges to be fair and reasonable.

The power of the Court to act under this Act arises only if it has found that the cost of the loan is excessive. It is true that it must also find the transaction to be harsh and unconscionable, but it may happen, as it did in the present case, that the judge who hears the case decides that the

[1] [1940] A.C. 513 at 531.

transaction is harsh and unconscionable because of the excessive cost of the loan. The result is that the very Court to which a creditor must resort in order to enforce payment of the interest or discount which the *Interest Act* says he may exact is, by the Provincial legislation, empowered to decide whether that interest or discount is, in all the circumstances, excessive. Furthermore, if that Court decides that it is excessive and that the transaction is harsh and unconscionable, it may relieve the debtor of the obligation of paying that portion of his obligation which it considers to be excessive, and thus is in a position to relieve him from the payment of an obligation which the Parliament of Canada has stated the creditor is entitled to exact from him.

In these circumstances there is a direct conflict between the two statutes and, that being so, the legislation of the Canadian Parliament, validly enacted, must prevail. As Lord Tomlin said in *Attorney-General for Canada v. Attorney-General for British Columbia*[1]:

> There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

In my opinion, therefore, the legislation in question is *ultra vires* of the Ontario Legislature and this appeal should be dismissed with costs. No costs should be awarded against or in favour of the intervenant.

Appeal allowed, Martland *and* Ritchie JJ. *dissenting.*

Solicitor for the appellant: E. R. Pepper, Toronto.

Solicitors for the respondent: Atlin, Goldenberg & Sischy, Toronto.

Solicitor for the Attorney General of Canada: E. A. Driedger, Ottawa.

Solicitors for the Attorney-General of Quebec: Farley & Beaudry, Hull.

[1] [1930] A.C. 111 at 118.

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*Feb. 11, 12, 13 Oct. 1

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, Local 16 - 601 (*Plaintiff*) — APPELLANT;

AND

IMPERIAL OIL LIMITED (*Defendant*) ..... — RESPONDENT;

AND

ATTORNEY-GENERAL OF BRITISH COLUMBIA (*Intervenant*) .. — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Labour law—Trade unions prohibited from using membership fees for political purposes—Whether legislation ultra vires of Provincial Legislature—Labour Relations Act, R.S.B.C. 1960, c. 205, s. 9(6) [*en. 1961, c. 31, s. 5*].

Section 9(6)(*c*)(i) of the Labour Relations Act, R.S.B.C. 1960, c. 205, enacted by 1961 (B.C.), c. 31, s. 5, prohibits a trade union from contributing to, or expending on behalf of, a political party, or a candidate for political office, directly or indirectly, moneys deducted from an employee's wages under check-off (whether statutory pursuant to a collective agreement), or paid to it as a condition of membership in the trade union. Section 9(6)(*d*) prohibits an employer from making any deduction from wages of an employee on behalf of a trade union unless the trade union delivers to the employer a statutory declaration that it is complying with and will continue to comply with s. 9(6)(*c*). Section 9(6)(*e*) provides that any moneys deducted from the wages of an employee and paid to a trade union that does not comply with this subsection are the property of the employee, and that the trade union is liable to the employe for any moneys so deducted.

The plaintiff, a local unit of a trade union, was certified, under the provisions of the *Labour Relations Act*, as the bargaining agent for a group of employees of the defendant company. Under the provisions of the collective agreement between the plaintiff and the defendant, the latter agreed to honour written assignments of wages given by employees in that group in favour of the plaintiff and to remit to the plaintiff each month the amount collected. Following the enactment of subs. (6) of s. 9 of the Act, the defendant advised the plaintiff that it could no longer honour the written assignments unless the plaintiff supplied it with the form of statutory declaration required by para. (*d*). The plaintiff refused to supply this and sued the company to compel it to honour the assignments, contending and seeking a declaration that paras. (*c*), (*d*) and (*e*) of subs. 6 were

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

ultra vires of the Legislature of British Columbia. The trial judge's decision that the statutory provisions under attack were *intra vires* of the provincial legislature was affirmed by the unanimous judgment of the Court of Appeal. An appeal from that judgment was brought to this Court.

Held (Cartwright, Abbott and Judson JJ. dissenting): The appeal should be dismissed.

Per Taschereau, Fauteux, Martland and Ritchie JJ.: The *Labour Relations Act* materially affected the civil rights of individual employees by conferring upon certified trade unions the power to bind them by agreement and the power to make agreements which compel membership in a union. Such legislation falls within the powers of the provincial legislature to enact, as being labour legislation, and, therefore, relating to property and civil rights in the province. The legislation under attack here did nothing more than to provide that the fee paid as a condition of membership in such an entity by each individual employee cannot be expended for a political object which may not command his support. That individual was brought into association with the trade union by statutory requirement. The same legislature which required this could protect his civil rights by providing that he cannot be compelled to assist in the financial promotion of political causes with which he disagrees. Such legislation was, in pith and substance, legislation in respect of civil rights in the province.

The question in issue was not as to the right to engage in political activity, but as to the existence of an unfettered right to use funds obtained in certain ways for the support of a political party or candidate. A trade union, when it becomes certified as a bargaining agent, becomes a legal entity (*International Brotherhood of Teamsters, Etc., Local 213 v. Therien*, [1960] S.C.R. 265). When the legislature clothes that entity with wide powers for the exaction of membership fees, by methods which previously it did not, in law, possess, it can set limits to the objects for which funds so obtained may be applied.

Reference re Alberta Statutes, [1938] S.C.R. 100; *Switzman v. Elbling and Attorney-General of Quebec*, [1957] S.C.R. 285, discussed.

Per Ritchie J.: The addition of subs. (6) to s. 9 of the Act, was directed towards ensuring that legislative machinery involving the adjustment of civil rights which was created for the regulation of relations between employers and employees should not be used for the collection of political party funds or in such manner as to curtail the fundamental political rights of any individual employee. Just as it was within the power of the province under s. 92(13) of the *British North America Act* to create this legislative machinery for the the purpose of furthering the cause of industrial peace so it was within its power to control its use for the same purpose.

The impugned legislation did not in any sense preclude a trade union from indulging in political activity or from collecting political party funds from its members. Its effect on political elections, if any, could only be characterized as incidental and this would not alter the fact that the amendment was a part and parcel of legislation passed "in relation to" labour relations and not "in relation to" elections either provincial or federal.

Per Cartwright, Abbott and Judson JJ., *dissenting*: The subject-matter of the legislation in question concerned political and constitutional

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rights, not property and civil rights. Clause (*c*) had no relationship whatever to trade union action designed to promote collective bargaining, to change conditions of employment or the contract of employment. Its sole object and purpose was to prevent trade unions from making political contributions out of their own moneys.

The control of political behaviour did not fall within the field of labour relations and was not within the provincial power. The legislation in question was legislation in relation to federal elections, a field exclusively within the Dominion power.

Per Cartwright J., *dissenting*: The effect of the impugned legislation in the known circumstances to which it was to be applied was a virtually total prohibition of the expenditure by a trade union of any of its funds to further the interests of any political party or candidate in a federal election; it was the prohibition of, *inter alia*, a political activity in the federal field which prior to the enactment was lawful in Canada. The argument that this prohibition of an heretofore lawful and indeed normal political activity in regard to federal elections is ancillary, or necessarily incidental, to any of the provisions of the *Labour Relations Act* which are within the provincial power was unacceptable.

Per Abbott J., *dissenting*: Under our constitution, any person or group of persons in Canada is entitled to promote the advancement of views on public questions by financial as well as by vocal or written means. Accordingly, any individual, corporation, or voluntary association such as a trade union, is entitled to contribute financially to support any political activity not prohibited by law.

Whatever power a provincial legislature may have to regulate expenditures for provincial political activities, it cannot legislate to regulate or prohibit contributions made to assist in defraying the cost of federal political or electoral activities. Similarly, Parliament itself cannot legislate to regulate or prohibit financial contributions for provincial political or electoral purposes except to the extent that such regulation or prohibition is necessarily incidental to the exercise of its powers under s. 91 of the *British North America Act*.

Subsection 6(*c*) of s. 9 of the *Labour Relations Act*, could not be supported as being in relation to property and civil rights in the province within s. 92(13) of the *British North America Act*, nor could it be said to be in relation to matters of a merely local or private nature in the province.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Whittaker J. Appeal dismissed, Cartwright, Abbott and Judson JJ., dissenting.

F. R. Scott, Q.C., and *T. R. Berger*, for the plaintiff, appellant.

T. E. H. Ellis, Q.C., for the defendant, respondent.

D. McK. Brown, Q.C., and *A. Fouks*, for the Attorney-General of British Columbia.

[1] (1962), 38 W.W.R. 533, 33 D.L.R. (2d) 732.

C. J. D. Taylor, Q.C., for the Attorney General of Saskatchewan.

The judgment of Taschereau, Fauteux and Martland JJ. was delivered by

MARTLAND J.:—Prior to its amendment in 1961, s. 9 of the *Labour Relations Act*, R.S.B.C. 1960, c. 205, contained, *inter alia*, the following provisions:

> 9. (1) Every employer shall honour a written assignment of wages to a trade-union certified under this Act, except where the assignment is declared null and void by a Judge or is revoked by the assignor.
>
> * * *
>
> (3) Except where an assignor of wages revokes the assignment by giving the employer written notice of the revocation, or except where a Judge declares an assignment to be null and void, the employer shall remit at least once each month, to the trade-union certified under this Act and named in the assignment as assignee, the fees and dues deducted, together with a written statement containing the names of the employees for whom the deductions were made and the amount of each deduction.

On March 27, 1961, the *Labour Relations Act Amendment Act, 1961*, (B.C.), c. 31, came into effect. It made a number of amendments to provisions of the *Labour Relations Act*, among which was the addition to s. 9 of a new subs. (6), which provides as follows:

> (6) (*a*) No employer and no one acting on behalf of an employer shall refuse to employ or to continue to employ a person and no one shall discriminate against a person in regard to employment only because that person refuses to make a contribution or expenditure to or on behalf of any political party or to or on behalf of a candidate for political office.
>
> (*b*) No trade-union and no person acting on behalf of a trade-union shall refuse membership to or refuse to continue membership of a person in a trade-union, and no one shall discriminate against a person in regard to membership in a trade-union or in regard to employment only because that person refuses to make or makes a contribution or expenditure, directly or indirectly, to or on behalf of any political party or to or on behalf of a candidate for political office.
>
> (*c*) (i) No trade-union and no person acting on behalf of a trade-union shall directly or indirectly contribute to or expend on behalf of any political party or to or on behalf of any candidate for political office any moneys deducted from an employee's wages under subsection (1) or a collective agreement, or paid as a condition of membership in the trade-union.
>
> (ii) Remuneration of a member of a trade-union for his services in an official union position held by him while seeking election or upon being elected to public office is not a violation of this clause.
>
> (*d*) Notwithstanding any other provisions of this Act or the provisions of any collective agreement, unless the trade-union delivers to the employer who is in receipt of an assignment under subsection (1) or who

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is party to a collective agreement, a statutory declaration, made by an officer duly authorized in that behalf, that the trade-union is complying with and will continue to comply with clause (*c*) during the term of the assignment or during the term of the collective agreement, neither the employer nor a person acting on behalf of the employer shall make any deduction whatsoever from the wages of an employee on behalf of the trade-union.

(*e*) Any moneys deducted from the wages of an employee and paid to a trade-union that does not comply with this subsection are the property of the employee, and the trade-union is liable to the employee for any moneys so deducted.

The issue in the present case is as to the constitutional validity of paras. (*c*), (*d*) and (*e*) of subs. (6), and primarily we are concerned with para. (*c*), as paras. (*d*) and (*e*) must stand or fall with it.

The appellant is a local unit of the Oil Chemical and Atomic Workers International Union and was certified, under the provisions of the *Labour Relations Act*, as the bargaining agent for a group of employees of the respondent company at its refinery at Ioco, British Columbia. Under the provisions of the collective agreement between the appellant and the respondent company, the company had agreed to honour written assignments of wages given by employees in that group in favour of the appellant and to remit to the appellant each month the amount collected.

Following the enactment of subs. (6) of s. 9 of the Act, the respondent company advised the appellant that it could no longer honour the written assignments unless the appellant supplied it with the form of statutory declaration required by para. (*d*). The appellant refused to supply this and sued the respondent company to compel it to honour the assignments, contending and seeking a declaration that paras. (*c*), (*d*) and (*e*) of subs. (6) were *ultra vires* of the Legislature of the Province of British Columbia. Notice was given to the respondent the Attorney-General of British Columbia (hereinafter referred to as "the respondent"), who intervened in the proceedings. The position of the respondent company throughout the proceedings has been that it is precluded from honouring the assignments without having received the required statutory declaration, so long as the legislation in question remains in effect. It has taken the position that it is substantially in the position of a stakeholder, with no interest in the proceedings and prepared to abide by the result.

The learned trial judge held that the statutory provisions under attack were *intra vires* of the Legislature of the Province of British Columbia. This decision was affirmed by the unanimous judgment of the Court of Appeal of British Columbia[1] and it is from that judgment that the present appeal is brought.

The appellant contends that the clauses in question are *ultra vires* of the Legislature of the Province of British Columbia, on the ground that the authority to enact them is not to be found within any of the subsections of s. 92 of the *British North America Act*; that they relate to the subject of federal elections and that they seek to curtail the fundamental rights of Canadian citizens essential to the proper functioning of parliamentary institutions. It is argued that they affect the political activity of trade unions, the right of which to engage in such activity is beyond the powers of a provincial legislature to curtail.

The submission of the respondent is that the legislation in question is a limitation only of the power to use certain specified funds for particular purposes by trade unions; that this limitation is valid legislation in respect of the field of labour relations and that the Legislature of British Columbia has the authority to enact it as being within the field of property and civil rights in the province, within s. 92(13) of the *British North America Act*.

That the field of legislation in relation to labour relations in a province is within the sphere of provincial legislative jurisdiction is established beyond doubt in the case of *Toronto Electric Commissioners v. Snider*[2]. This is not disputed by the appellant, which, however, contends that the clauses in question are not in respect of labour relations at all.

In order to determine these issues it is necessary to consider the provisions of the *Labour Relations Act* as a whole and, in particular, to consider the true purpose and effect of those clauses which are under attack.

The object of this Act, which is similar to like statutes in other provinces of Canada, may be summarized in the words

[1] (1962), 38 W.W.R. 533, 33 D.L.R. (2d) 732.

[2] [1925] A.C. 396.

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of MacDonald J., in *Re Labour Relations Board (Nova Scotia)*[1]:

> To my mind the object of the Act is to facilitate collective bargaining and stabilize industrial relations by enabling a union to establish before the Board its ability to represent a group of employees; and, with this controversial question settled, to require the employer, upon notice from the union, to negotiate with it and (with the aid of conciliation services), to promote the conclusion of an agreement which shall be legally enforceable; and generally to ensure a greater measure of industrial peace to the public. Certification is, of course, not necessary for collective bargaining, but the policy of the Act undoubtedly is to promote it as a means to more orderly bargaining.

The instrument for collective bargaining on behalf of employees is a trade union, which is defined, in s. 2(1) of the Act, as follows:

> "trade-union" means a local or provincial organization or association of employees, or a local or provincial branch of a national or international organization or association of employees within the Province, that has as one of its purposes the regulation in the Province of relations between employers and employees through collective bargaining, but does not include any organization or association of employees that is dominated or influenced by an employer;

While it is theoretically possible for a collective agreement to be made with an uncertified trade union, it is only possible for a trade union to become the bargaining agent for a unit of employees who are not all members of the union by obtaining certification under the Act. It is clear that the Act is primarily concerned with the procedures necessary to obtain certification and for collective bargaining after certification has been obtained.

Those procedures materially affect the rights of employees in any unit suitable for collective bargaining and of their employer, who is compelled to bargain collectively with a certified trade union. The primary purpose of the Act is, therefore, to spell out the respective rights and obligations of the employer, the employee and the certified trade union, each of which is subject to its mandatory powers.

A trade union, as defined in the Act, may obtain certification for a group of employees, in accordance with the statutory requirements. It may apply for certification if it claims to have as members in good standing a majority of the employees in that group.

[1] (1952), 29 M.P.R. 377 at 396.

When a trade union has been certified by the Labour Relations Board, it has exclusive authority to bargain collectively on behalf of the unit and to bind the individuals in that unit by a collective agreement. It can require an employer to enter into collective bargaining, with a view to the making of a collective agreement, and such an agreement, when made, is binding, not only upon the trade union which has entered into the agreement, but also upon every employee covered by the agreement. Every person who is bound by a collective agreement is obligated, by the Act, to do everything he is required to do and to refrain from doing anything that he is required to refrain from doing by the provisions of the collective agreement.

The position is, therefore, that a trade union can, under the provisions of the Act, become the bargaining agent for all the employees within a particular unit, irrespective of the individual wishes of the minority of employees within that group, and that it can then bind each of such employees by the collective agreement which it makes. It is placed in a position to persuade those employees within the group, who were not members of the union, to seek membership, for it is now their bargaining agent, entering collective agreements on their behalf. In some instances the form of the collective agreement which it makes may compel their contribution to its funds, whether they are members or not. But this is not all. Section 8 of the Act provides as follows:

> 8. Nothing in this Act shall be construed to preclude the parties to a collective agreement from inserting in the collective agreement a provision requiring, as a condition of employment, membership in a specified trade-union, or granting a preference of employment to members of a specified trade-union, or to preclude the carrying-out of such provisions.

Where a collective agreement contains a provision of the kind contemplated in this section, membership in the trade union becomes a condition of employment within the group of employees in question and loss of membership automatically involves loss of employment. A person seeking employment in such a group, or desiring to remain as an employee within it, has no alternative but to obtain membership in the trade union which is its bargaining agent, and, for that purpose, to pay to it such dues as are imposed as a condition of membership in it.

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I now propose to consider the provisions of the clauses in question in this case. The appellant's attack is mainly upon clause (*c*)(i), which prohibits a trade union from contributing to, or expending on behalf of, a political party, or a candidate for political office, directly or indirectly, moneys deducted from an employee's wages under the check-off (whether statutory or pursuant to a collective agreement), or paid to it as a condition of membership in the trade union.

Clause (*c*)(i) deals first with funds obtained by the check-off, which is imposed under the statute by the provisions of s. 9(1). This right of check-off was created by the statute and granted as a statutory privilege to the trade union. The legislature which conferred that statutory right could also take it away again and, if the right can be eliminated entirely, in my opinion it is equally possible for the legislature to apply limitations in respect of the exercise of the power thus created.

The second method is by check-off authorized by a collective agreement. Again, as already pointed out, the right of a trade union to bind all employees in a specific group, whether members of the union or not, by the collective agreement which it negotiates is one which is conferred by the Act, and the legislature which conferred it could also eliminate it. It seems to me that if the legislature can eliminate that right entirely it can also impose limitations in respect of its use.

Finally, there is the provision as to membership dues paid by an employee to a trade union as a condition of his membership in it. This is the point on which counsel for the appellant concentrated a good deal of his argument. Membership fees paid to a trade union were, he contended, its own property, which, as a voluntary association, it is entitled to disburse in such manner as its own constitution permits and as the majority of its membership decides; a trade union is entitled to engage in political activities as a free association of individuals and, therefore, within the limits previously mentioned, could disburse its funds for such purposes, and any attempted interference with such powers by a provincial legislature would be an interference with the democratic process in Canada and, therefore, beyond its powers.

This argument would have considerable force as applied to a purely voluntary association. However, the position of a trade union, which has been certified as a bargaining agent under the Act, is substantially different and every association within the definition of a trade union in the Act is empowered to seek certification. Such a union has, as a result of certification, ceased to be a purely voluntary association of individuals. It has become a legal entity, with the status of a bargaining agent for a group of employees, all of whom are thereby brought into association with it, whether as members, or as persons whom it can bind by a collective agreement, even though not members. It must, as their agent, deal with the members of the group which it represents equitably. It is clothed with a power to make binding agreements which can compel membership in it as a condition of employment. I find it difficult to regard as a free, voluntary association of individuals an entity which, by statute, is clothed with a power to require membership in it, and the consequent payment of dues to it as the price which must be paid by an individual for the right to be employed in a particular employment group.

The *Labour Relations Act* has materially affected the civil rights of individual employees by conferring upon certified trade unions the power to bind them by agreement and the power to make agreements which will compel membership in a union. Such legislation falls within the powers of the Legislature of the Province of British Columbia to enact, as being labour legislation, and, therefore, relating to property and civil rights in the province. The legislation which is under attack in the present proceedings, in my opinion, does nothing more than to provide that the fee paid as a condition of membership in such an entity by each individual employee cannot be expended for a political object which may not command his support. That individual has been brought into association with the trade union by statutory requirement. The same legislature which requires this can protect his civil rights by providing that he cannot be compelled to assist in the financial promotion of political causes with which he disagrees. Such legislation is, in pith and substance, legislation in respect of civil rights in the province.

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Considerable reliance was placed by the appellant on the judgment of Chief Justice Duff in respect of the Alberta *Act to Ensure the Publication of Accurate News and Information*[1]. In that judgment, which was concurred in by Davis J., Chief Justice Duff dealt with the right of public discussion under the constitution established by the *British North America Act* and the authority of the Parliament of Canada to legislate for the protection of that right. He said, at p. 134:

> The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the *Alberta Social Credit Act,* presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces. Inded, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of *The British North America Act* and the statutes of the Dominion of Canada.

It may be noted, in passing, that he did not decide whether or not the particular legislation which was before him exceeded the limits which he had defined.

The test stated is as to whether legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada. The appellant, in this case, contends that the legislation in issue does effect such a curtailment in respect of the right of association for political purposes.

The legislation, however, does not affect the right of any individual to engage in any form of political activity which he may desire. It does not prevent a trade union from engaging in political activities. It does not prevent it from soliciting funds from its members for political purposes, or limit, in any way, the expenditure of funds so raised. It does prevent the use of funds, which are obtained in particular ways, from being used for political purposes.

The question in issue here is not as to the right to engage in political activity, but as to the existence of an unfettered right to use funds obtained in certain ways for the support

[1] [1938] S.C.R. 100 at 132.

of a political party or candidate. I think it is clear that, if such legislation were required, a provincial legislature could prevent the contribution of trust funds for such a purpose and that, equally, it could prevent the use by a corporation, created under provincial law, of funds derived from the sale of its bonds or shares for such a purpose. A trade union, when it becomes certified as a bargaining agent, becomes a legal entity (*International Brotherhood of Teamsters Etc., Local 213 v. Therien*[1]). When the legislature clothes that entity with wide powers for the exaction of membership fees, by methods which previously it did not, in law, possess, it can set limits to the objects for which funds so obtained may be applied. Legislation of this kind is not, in my view, a substantial interference with the working of parliamentary institutions.

Reference was also made to the decision of this Court in *Switzman v. Elbling and Attorney-General of Quebec*[2]. In that case it was held that the *Act Respecting Communistic Propaganda* of the Province of Quebec was *ultra vires* of the Legislature of that Province. The majority of the Court decided the issue on the basis that the legislation in question was in respect of criminal law and, therefore, within the exclusive competence of the Parliament of Canada. Three members of the Court decided that the legislation was not within any of the powers ascribed to the provinces and that it constituted an unjustifiable interference with freedom of speech and expression essential to the democratic form of government established in Canada.

One of the three judges, Rand J., stated the issue at p. 305:

> The ban is directed against the freedom or civil liberty of the actor; no civil right of anyone is affected nor is any civil remedy created. The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. There is nothing of civil rights in this; it is to curtail or proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.

In my opinion, the present situation is quite different. What the Legislature has provided here is that, though the

[1] [1960] S.C.R. 265, 22 D.L.R. (2d) 1.
[2] [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

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civil rights of employees in the Province may be curtailed by enabling a trade union to bargain for them, to make agreements on their behalf, to enter collective agreements which may make union membership a condition of their employment and to collect membership fees by a system of check-off, they cannot be required, by the payment of union dues, to contribute to a political party or candidate selected for them by the trade union itself.

The appellant submitted that, even if the legislation were to be considered as, in pith and substance, designed to safeguard the fundamental right of an individual to support the party of his own choice, it would still be *ultra vires* of a provincial legislature. It was contended that only the Canadian Parliament could legislate in relation to individual political freedom. The submission was that, as a provincial legislature could not legislate to derogate from such rights, conversely it could not legislate for their protection.

I do not agree with this contention. It is the very fact that provincial legislation, in some instances, has apparently sought to derogate from fundamental political freedoms which has led to the expression of the view by some members of the Court, in cases such as the *Alberta Press* case and *Switzman v. Elbling and Attorney General of Quebec,* that it could not be regarded as falling within the sphere of property and civil rights in the province, within s. 92 of the *British North America Act*. The same reasoning does not apply to legislation which seeks to protect certain civil rights of individuals in a province from interference by other persons also in that province. Legislation of that kind appears to me to be legislation in respect of civil rights within the province.

The appellant also contended that the enactment by the Parliament of Canada of s. 36 of c. 26, Statutes of Canada 1908, *An Act to amend the Dominion Elections Act,* which provision was repeated in s. 10 of the *Dominion Elections Act,* 1920 (Canada), c. 46, and again in s. 9 of the *Dominion Elections Act,* R.S.C. 1927, c. 53, but repealed in 1930, showed that the legislation in question here must have been an encroachment on the field reserved to the Parliament of Canada. That section provided:

> 36. No company or association other than one incorporated for political purposes alone shall, directly or indirectly, contribute, loan,

advance, pay or promise or offer to pay any money or its equivalent to, or for, or in aid of, any candidate at an election, or to, or for, or in aid of, any political party, committee, or association, or to or for or in aid of any company incorporated for political purposes, or to, or for, or in furtherance of, any political purpose whatever, or for the indemnification or reimbursement of any person for moneys so used.

The argument was that this section clearly indicates that legislation regarding contributions to federal political parties is a matter outside the sphere of provincial legislation. But the section did not enable an association or company to make contributions for political purposes. It, in terms, forbade them. It does not follow that without that provision every association and company did have the legal right to make such contributions. The right of any association or company to do so would depend upon the scope of its lawful authority, which, in certain cases in any event, would depend upon the powers which had been conferred upon them by provincial legislation.

For these reasons, in my opinion, the appeal should be dismissed. The Attorney-General of British Columbia advised that no order as to costs is asked for. The position of the respondent, Imperial Oil Limited, in these proceedings has already been described. No submission was made on its behalf with respect to the constitutional validity of the legislation in question. In view of these circumstances I do not think there should be any order as to costs in favour of this respondent. There should be no order as to costs in favour of or against the intervenant, the Attorney General of Saskatchewan.

CARTWRIGHT J. (*dissenting*):—The facts and the relevant statutory provisions are set out in the reasons of other members of the Court.

I agree with the reasons and conclusion of my brother Judson and wish to add only a few words.

This appears to me to be a case in which it is particularly desirable to recall the words of Sir Montague Smith in *Citizens Insurance Company of Canada v. Parsons*[1], when, speaking of the duty of the courts to define in the particular

[1] (1881), 7 App. Cas. 96.

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case before them the limits of the powers of Parliament and of the provincial legislatures, he said at p. 109:

> In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute (i.e. the British North America Act) than is necessary for the decision of the particular question in hand.

The question to be decided is whether the enactment of clause (*c*)(i) of subs. 6 of s. 9 of the *Labour Relations Act* is within the powers of the provincial legislature. The clause is an absolute and unconditional prohibition of the contribution by a trade union to any political party or any candidate for political office of any moneys paid to the union as a condition of membership. It may well be that the Court could take judicial notice of the fact that moneys so paid make up practically the whole of the income of a trade union, but in the case before us there is uncontradicted evidence that, generally speaking, this is so as regards trade unions in British Columbia and that moneys so paid to the appellant union made up more than 99.8 per cent of its total revenue for the year 1960, the year preceding the issue of the writ.

The effect of the impugned legislation in the known circumstances to which it is to be applied is a virtually total prohibition of the expenditure by a trade union of any of its funds to further the interests of any political party or candidate in a federal election; it is the prohibition of, *inter alia,* a political activity in the federal field which prior to the enactment was lawful in Canada.

The prohibition, if valid, would be operative even if the forbidden contribution were approved and directed by a unanimous vote of all the members of the union concerned.

I find myself unable to accept the argument that this prohibition of an heretofore lawful and indeed normal political activity in regard to federal elections is ancillary, or necessarily incidental, to any of the provisions of the *Labour Relations Act* which are within the provincial power.

I would dispose of the appeal as proposed by my brother Judson.

ABBOTT J. (*dissenting*):—I am in agreement with the reasons of my brother Judson and I desire to add only a

few brief comments. In *Switzman v. Elbling and Attorney-General of Quebec*[1]—as my brother Judson has pointed out—three judges of the Court held that the legislation there in question constituted an unjustifiable interference with the freedom of speech and expression essential under the democratic form of parliamentary government established in Canada.

In the *Switzman* case, I expressed the view that the parliamentary institutions established in Canada by the *British North America Act* were those institutions as they existed in the United Kingdom in 1867. In the *Reference re Alberta Statutes*[2] Sir Lyman Duff pointed out that those institutions contemplated a parliament and provincial legislatures working under the influence of public opinion and public discussion, and he expressed the opinion that any attempt to abrogate or suppress the exercise of such right of public debate and discussion was beyond the competence of a provincial legislature. With that view I am in agreement.

Parliamentary institutions as they existed in the United Kingdom in 1867 included the right of political parties to function as a means, whereby persons who broadly speaking share similar views as to what public policy should be, can seek to make those views prevail. It is common knowledge that political activities in general, and the conduct of elections in particular, involve legitimate and necessary expenditures by political parties and candidates, for the payment of which no provision is made out of public funds. That this is so is implicit in the terms of the *Canada Elections Act*, 1960 (Canada), c. 39.

The right to join and to support a political party and the right of public debate and discussion fall within that class of rights categorized by Mr. Justice Mignault in his *Droit Civil Canadien*, vol. 1, p. 131, as *droits publics*, and in my opinion, under our constitution, any person or group of persons in Canada is entitled to promote the advancement of views on public questions by financial as well as by vocal or written means. It follows that any individual, corporation, or voluntary association such as a trade union, is entitled to contribute financially to support any political activity not prohibited by law.

[1] [1957] S.C.R. 285, 7 D.L.R. (2d) 337.
[2] [1938] S.C.R. 100, 2 D.L.R. 81.

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Whatever power a provincial legislature may have to regulate expenditures for provincial political activities, in my opinion it cannot legislate to regulate or prohibit contributions made to assist in defraying the cost of federal political or electoral activities. Similarly, for the reasons which I expressed in the *Switzman* case, in my view Parliament itself cannot legislate to regulate or prohibit financial contributions for provincial political or electoral purposes except to the extent that such regulation or prohibition is necessarily incidental to the exercise of its powers under s. 91 of the *British North America Act*.

The legislative purpose of subs. 6(*c*) of s. 9 of the British Columbia *Labour Relations Act* is clear and unambiguous. That purpose is to prohibit political contributions made directly or indirectly by one class of voluntary organization—a trade union—out of moneys received as a condition of membership, whether or not there is a check-off. Legislation of this character cannot be supported as being in relation to property and civil rights in the province within head 13 of s. 92 of the *British North America Act*, nor can it be said to be in relation to matters of a merely local or private nature in the province. In my opinion, it is clearly *ultra vires*.

I would dispose of the appeal as proposed by my brother Judson.

JUDSON J. (*dissenting*):—The appellant union sued Imperial Oil Limited for specific performance of the provisions in its collective agreement relating to the right of check-off. The company defended on the ground that certain amendments to the British Columbia *Labour Relations Act* enacted in 1961 prevented it from giving effect to these provisions. The union claimed that these amendments were beyond the powers of the legislature. The learned trial judge dismissed the action and his dismissal was affirmed on appeal. The defendant company, whose position is that of a stakeholder, has, throughout these proceedings, submitted its rights to the Court and the burden of the defence has been assumed by the Attorney-General of British Columbia. In this Court, of all those who were notified, only the Attorney General of Saskatchewan has filed a factum and

he supports the appellant union in its claim that the legislation is *ultra vires*.

The 1961 legislation seeks to make the right of check-off for union dues dependent upon the union's refraining from making contributions to a political party or to a candidate for political office. It was enacted by 1961 (B.C.), c. 31, s. 5, as an addition to s. 9 of the *Labour Relations Act*, R.S.B.C. 1960, c. 205. Before the amendment s. 9 contained 5 subsections, which read:

> 9. (1) Every employer shall honour a written assignment of wages to a trade-union certified under this Act, except where the assignment is declared null and void by a Judge or is revoked by the assignor.
>
> (2) An assignment pursuant to subsection (1) shall be substantially in the following form:—
>
> To [*name of employer*].
>
> Until this authority is revoked by me in writing, I hereby authorize you to deduct from my wages and to pay to [name of the certified trade-union] fees in the amounts following:—
>
> (1) Initiation fees in the amount of $
>
> (2) Dues of $ per
>
> (3) Except where an assignor of wages revokes the assignment by giving the employer written notice of the revocation, or except where a Judge declares an assignment to be null and void, the employer shall remit at least once each month, to the trade-union certified under this Act and named in the assignment as assignee, the fees and dues deducted, together with a written statement containing the names of the employees for whom the deductions were made and the amount of each deduction.
>
> (4) If an assignment is revoked, the employer shall give a copy of the revocation to the assignee.
>
> (5) Notwithstanding subsections (1), (2) and (3), there shall be no financial responsibility on the part of an employer for fees or dues of an employee unless there are sufficient unpaid wages of that employee in the employer's hands.

With the legislation in this form no one disputes that there was nothing to prevent a trade union from giving financial support to a political party or a candidate for political office and that for this purpose it could use the money it received from the check-off of union dues or paid as a condition of membership. The moneys belonged to the union and it had the right to apply them as it wished, in accordance with its constitution.

The amendments of 1961 were introduced by the enactment of a new subsection (6), which was added to s. 9. This new subsection reads:

> (6) (*a*) No employer and no one acting on behalf of an employer shall refuse to employ or to continue to employ a person and no one

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shall discriminate against a person in regard to employment only because that person refuses to make a contribution or expenditure to or on behalf of any political party or to or on behalf of a candidate for political office.

(*b*) No trade-union and no person acting on behalf of a trade-union shall refuse membership to or refuse to continue membership of a person in a trade-union, and no one shall discriminate against a person in regard to membership in a trade-union or in regard to employment only because that person refuses to make or makes a contribution or expenditure, directly or indirectly, to or on behalf of any political party or to or on behalf of a candidate for political office.

(*c*) (i) No trade-union and no person acting on behalf of a trade-union shall directly or indirectly contribute to or expend on behalf of any political party or to or on behalf of any candidate for political office any moneys deducted from an employee's wages under subsection (1) or a collective agreement, or paid as a condition of membership in the trade-union.

(ii) Remuneration of a member of a trade-union for his services in an official union position held by him while seeking election or upon being elected to public office is not a violation of this clause.

(*d*) Notwithstanding any other provisions of this Act or the provisions of any collective agreement, unless the trade-union delivers to the employer who is in receipt of an assignment under subsection (1) or who is party to a collective agreement, a statutory declaration, made by an officer duly authorized in that behalf, that the trade-union is complying with and will continue to comply with clause (*c*) during the term of the assignment or during the term of the collective agreement, neither the employer nor a person acting on behalf of the employer shall make any deduction whatsoever from the wages of an employee on behalf of the trade-union.

(*e*) Any moneys deducted from the wages of an employee and paid to a trade-union that does not comply with this subsection are the property of the employee, and the trade-union is liable to the employee for any moneys so deducted.

The questioned clauses in this legislation are (*c*), (*d*) and (*e*).

After the amendments came into force the company demanded a statutory declaration provided for in clause (*d*) and when the union refused to supply it, it ceased to make the usual deductions of union dues.

Clause (*c*) is framed in the widest terms. Political contributions are prohibited from moneys derived from the check-off and moneys paid as a condition of membership whether or not there is a check-off. This strikes at everything except a voluntary collection for political purposes made outside the machinery of the Act and the collective agreement.

The legislation has been held to be *intra vires* as legislation in relation to property and civil rights in the province

under s. 92(13) of the *British North America Act*. The Attorney-General for British Columbia supports the judgment under appeal as a valid exercise of the provincial power on two grounds: (a) that it assures every individual who is a member of a trade union the right to refrain from supporting any political party without fear of discrimination; and (b) that it prevents money collected by check-off and as a condition of union membership being diverted from the support of normal union activity in the field of labour relations to the more remote field of political activity. He further submits that no intention to hinder the operations of any political party can be imputed to the legislature, that the legislation does not interfere with the right of an individual to engage in political activity either alone or in association with others, and that it is directed to freeing a union member from any obligation to make political contributions of which he disapproves.

On the other hand, the union attacks the legislation on 5 grounds:

1. The matters dealt with in these subsections do not fall within the field of labour relations but are in relation to the political activity of trade unions.
2. The legislation is legislation in relation to federal elections.
3. The legislation seeks to curtail fundamental rights of Canadian citizens guaranteed by the *British North America Act* essential to the proper functioning of Parliamentary institutions.
4. Even if the legislation should be considered in pith and substance legislation designed to safeguard "the fundamental right of the individual to give his support to the party of his choice", (as held in the Courts below), it is still *ultra vires* the Province.
5. A trade union, being formed by the voluntary association of its members, does not lose its freedom of choice in political matters by reason of the fact that certain of its activities may be validly regulated by provincial statutes.

The issues are not as clear-cut as might at first sight appear. The problem of the use of union funds is entangled with the machinery of the Act relating to collection of dues and with the powers of compulsory representation which the union acquires under the Act when it is certified as a unit that is appropriate for collective bargaining. But it also has a political aspect. The union constitution on file discloses that this local has financial obligations to the international union and also to the Canadian Labour Congress and the British Columbia Federation of Labour. The con-

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stitution of the New Democratic Party was also filed and it provides for affiliated membership open to trade unions and other groups. It follows from this that the local cannot take this statutory declaration even if it refrains itself from making any political contributions because the prohibition is against direct or indirect contributions. This leaves the only possible participation in political activity requiring financial contributions to the voluntary collection outside the framework of the Act and the collective agreement.

In my opinion, the union's submission that the matters dealt with in the questioned clauses do not fall within the field of labour relations but are in relation to the political activity of trade unions is an accurate characterization of this legislation. The subject-matter of the legislation concerns political and constitutional rights, not property and civil rights. Section (*c*) has no relationship whatever to trade union action designed to promote collective bargaining, to change conditions of employment or the contract of employment. Its sole object and purpose is to prevent trade unions from making these contributions out of their own moneys. The legislation does the following:

(*a*) It prohibits trade unions using initiation fees and membership dues, whether paid by payroll deductions (*i.e.* checked off), or directly to the union, for political purposes (Section 9(6) (*c*)).

(*b*) It prohibits an employer from honouring his checkoff arrangements with a trade union unless he receives a statutory declaration showing that the money being checked off is not being used for political purposes, and will not be used for such purposes in the future (Sec. 9(6) (*d*)).

(*c*) It confers a right of action upon an individual trade union member against his trade union, allowing him to recover all of the money checked off against his wages, whenever his trade union uses it for political purposes contrary to the legislation (Section 9(6) (*e*)).

(*d*) It makes it an offence, punishable by a fine of $250 or more, for a trade union to spend initiation fees or membership dues collected from its members, for political purposes (under s. 60 of the *Labour Relations Act* any violation of the Act is punishable as an offence).

The leading feature of the legislation is the prohibition, found in clause (*c*), of political contributions by trade unions. The provisions in clauses (*d*) and (*e*) are merely ancillary. They are designed to secure obedience to the prohibition laid down by clause (*c*). Therefore, in the case at

bar, in deciding whether the plaintiff was obliged to deliver a statutory declaration under clause (*d*), the Court must determine the validity of clause (*c*).

In my opinion, it would be a grave and unwarranted extension of principle to hold that the decision in *Toronto Electric Commissioners v. Snider*[1] enables the province to control and curtail the political contributions of the trade union. Any such extension would be in direct conflict with the fundamental basis of the decision in this Court in *Switzman v. Elbling and Attorney-General of Quebec*[2], where all the judges in the majority were of the opinion that the legislation there in question was outside the provincial power. Five members of the Court held that it was outside the provincial power because it was legislation in relation to criminal law. Three held that it was not within any of the powers specifically assigned to the provinces and that it constituted an unjustifiable interference with freedom of speech and expression essential under the democratic form of government established in Canada.

I am also of the opinion that this legislation is directly related to elections, including federal elections. Its purpose is not a general restriction on the disposition of funds of trade unions. The provincial legislature has no power to restrict the right of any person or organization within the province to make contributions at federal elections and to federal candidates. There was at one time such a restriction in the Dominion legislation. The *Dominion Elections Act*, 1920, contained the following provision:

> No unincorporated company or association and no incorporated company or association other than one incorporated for political purposes alone shall, directly or indirectly, contribute, loan, advance, pay or promise or offer to pay money or its equivalent to, or for, or in aid of, any candidate at an election or to, or for, or in aid of any political party, committee or association, or to, or for, or in aid of any company incorporated for political purposes, or to, or for, or in furtherance of any political purpose whatever, or for the indemnification or reimbursement of any person for money so used.

This provision became s. 9 of the *Dominion Elections Act*, 1927, and was repealed in 1930. The *Canada Elections Act*, 1960, c. 39, contemplates in terms broad enough to include

[1] [1925] A.C. 396.
[2] [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

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a trade union the making of contributions to and expenditures on behalf of political parties and candidates for political office. This provincial legislation is really a re-enactment against trade unions in British Columbia of the former prohibition contained in the *Dominion Elections Act* and repealed in 1930. This is sufficient to characterize the legislation and to put it beyond provincial competence.

I am confining my reasons for judgment to the two first grounds put forward by the appellant, namely, that the control of political behaviour does not fall within the field of labour relations and is not within the provincial power, and secondly, that this legislation is legislation in relation to federal elections, a field exclusively within the Dominion power.

I would allow the appeal with costs throughout against Imperial Oil Limited. The appellant is entitled to the following relief:

(1) A declaration that clauses (*c*), (*d*) and (*e*) of subsection 6 of section 9 of the *Labour Relations Act,* as amended by the *Labour Relations Act Amendment Act, 1961* are ultra vires the Legislature of the Province of British Columbia.

(2) Specific performance of the provisions of the Collective Agreement made between the parties requiring the respondent Imperial Oil Limited to honour assignments of wages to the appellant by employees of the said respondent and to remit them to the appellant.

RITCHIE J.:—The circumstances giving rise to this appeal and the relevant provisions of the *Labour Relations Act,* R.S.B.C. 1960, c. 205, have been set out and analyzed in the reasons for judgment of my brother Martland with which I am in full agreement. As has been indicated in those reasons, each trade union to which the Act applies is a potential bargaining agent capable, when so certified by the Labour Relations Board, of being clothed with the exclusive authority to bargain collectively on behalf of a group of employees some of whom may not be union members and to bind each individual in that group by the terms and conditions of a collective agreement negotiated by it with their employer which may include a provision making membership in the trade union a condition of employment.

These provisions of the *Labour Relations Act* which make it possible for a certified trade union, without regard to the

wishes of any dissentient minority within the unit for which it is certified, to enter into a collective agreement requiring the individuals composing such a minority to pay trade union dues as a condition of employment, are a part of the legislative machinery created by the Province of British Columbia, for the limited purpose of regulating within that province the relations between employers and employees through collective bargaining.

It is widely accepted that such regulation is greatly facilitated by a single representative being authorized to speak effectively and with finality at the bargaining table on behalf of all the employees concerned and in so far as it may be necessary, in order to achieve this end, to limit the civil rights of a minority of those represented by such authority it is within the legislative competence of the provincial legislature to do so (see *Toronto Electric Commissioners v. Snider*[1]). In my opinion, it is also within the power of the province to so amend its legislation as to ensure that any such limitation on the civil rights of an individual is not employed for any purpose other than that for which it was imposed.

Even if it were not for the enactment of s. 9(6)(*c*) and (*d*), it would appear to me to be highly unlikely that the provisions of the Act which make it possible for union dues to be collected as a condition of employment were intended to be used for the purpose of facilitating the collection of political party funds in such manner as to have a possible effect on federal elections.

It was, however, possible under this Act before the amendment of 1961, for moneys paid by an employee as a condition of employment to be used without his consent for the support of a political party in which he did not believe and for the internal arrangements made by an employer in order to comply with the "check-off" to be used for the purpose of assisting in the collection of political contributions to a party to which the employer was opposed.

The addition of subs. (6) to s. 9 of the Act in 1961 was, in my opinion, directed towards ensuring that legislative machinery involving the adjustment of civil rights which was created for the regulation of relations between em-

[1] [1925] A.C. 396 at 403.

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ployers and employees should not be used for the collection of political party funds or in such manner as to curtail the fundamental political rights of any individual employee.

I am of opinion that just as it is within the power of the province under s. 92(13) of the *British North America Act* to create this legislative machinery for the purpose of furthering the cause of industrial peace so it is within its power to control its use for the same purpose.

The impugned legislation does not, in my view, have the effect of in any sense precluding any trade union from indulging in political activity or from collecting political party funds from its members, but the relations between a trade union and the political party of its choice differ fundamentally in character and purpose from the relations between the employees in the unit which it represents and their employer, and as it is for the regulation of this latter relationship that this legislative machinery has been established it appears to me to be within the sphere of provincial jurisdiction to so amend the *Labour Relations Act* as to recognize this difference in express terms.

Even if it could be said that the legislation under attack (s. 9(6), (*c*) and (*d*)) had any effect on political elections such an effect could, in my view, only be characterized as incidental and this would not alter the fact that the amendment in question is a part and parcel of legislation passed "in relation to" labour relations and not "in relation to" elections either provincial or federal.

The legislation here under attack has the effect of ensuring that associations which have been given a controlling power over their members by provincial legislation are not to be permitted to use that power for the purpose of compelling such members to support a political party not of their own choice.

For all these reasons, as well as for those stated by Martland J., I am of opinion that the enactment of s. 9(6) (*c*) and (*d*) of the *Labour Relations Act Amendment Act, 1961,* (B.C.), c. 31, was within the legislative competence of the legislature of that province and I would accordingly dispose of this appeal in the manner proposed by Martland J.

Appeal dismissed, CARTWRIGHT, ABBOTT *and* JUDSON JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Shulman, Tupper, Worrall & Berger, Vancouver.

Solicitors for the defendant, respondent: Buell, Ellis, Sargent & Russell, Vancouver.

Solicitor for the Attorney-General of British Columbia: D. McK. Brown, Vancouver.

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DAME LONA MARIE VAUGHAN (*Demanderesse*) ..... APPELANTE;

ET

DAME CELESTE GLASS *ET AL.* (*Défendeurs*) ..... INTIMÉS.

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*Oct. 23, 24

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Jun. 24

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Testament—Interprétation—Don «par souche»—Survivants—Usufruit—Substitution—Intention du testateur.

Le testament de la testatrice, décédée en 1909, contenait les deux clauses suivantes:

11. I leave and bequeath all my estate, bonds, stocks and ready money . . . unto my six children . . . , to be by them enjoyed in equal shares during their lifetime, they drawing the revenues, interest and dividends thereof respectively, without being obliged to make any inventory or to give security; and after their death, onto their children *par souche;* to be by my grandchildren, *par souche,* owned and enjoyed in full ownership, but the latter shall not have the right to ask for or to have any partition of my estate until after the demise of the last *souche.* In the event of any *souche* dying without legitimate issue, I will and direct that his or her share shall accrue to the other *souches* in equal shares.

12. I will and ordain that the said usufruct or enjoyment of my said children shall be *inalienable* and *insaisissable* and in the case of the female children not under marital control.

Deux seulement des enfants de la testatrice eurent des enfants. La demanderesse est la veuve et l'unique héritière de l'unique représentant, lui-même décédé en 1925, d'une de ceux deux souches. Les défendeurs

*CORAM: Les Juges Taschereau, Cartwright, Fauteux, Abbott et Judson.

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sont les représentants de l'autre souche. À sa mort le mari de la demanderesse était en possession d'un cinquième de la succession, ayant reçu un sixième au décès de sa mère et le reste au décès d'une autre des enfants de la testatrice. Les quatre autres enfants de la testatrice sont décédés sans enfants subséquemment à la mort du mari de la demanderesse.

La demanderesse prétend que le testament contient deux libéralités conjointes soit un legs d'usufruit aux enfants et un legs de nue propriété aux petits-enfants par souche; qu'en conséquence elle a droit à la moitié de la succession au lieu d'un cinquième puisqu'il n'y a que deux groupes de petits-enfants. Le juge de première instance considéra qu'une substitution avait été créée, que le décès du mari de la demanderesse avait entraîné l'extinction au droit au bénéfice de l'accroissement subséquent, et donc que la demanderesse n'avait droit qu'au cinquième. Le dispositif de ce jugement fut confirmé par une décision majoritaire de la Cour du banc de la reine. La demanderesse en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Il faut donner aux testaments une interpretation «fair and literal». La testatrice a créé une substitution fidéicommissaire distincte pour chaque souche représentée par chacun de ses enfants. Le décès du mari de la demanderesse en 1925 entraîna l'extinction de la souche représentée par sa mère; et conséquemment, l'accroissement pourvu dans la clause 11 ne pouvait après cette date bénéficier éventuellement qu'aux quatre autres enfants survivants de la testatrice. La prétention de la demanderesse à l'effet que seules les souches fertiles devaient profiter de l'accroissement n'est pas justifiée par le texte et de plus est incompatible avec la manifeste intention de la testatrice d'attribuer ses biens en ligne directe à ses descendants et non à leurs époux.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant le jugement du Juge Salvas. Appel rejeté.

John de M. Marler, C.R., et *P. W. Gauthier,* pour la demanderesse, appelante.

John L. O'Brien, C.R., Charles J. Gélinas, C.R., et *John R. Hannan,* pour les défendeurs, intimés.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—L'appelante est l'unique héritière de James Frederick Judah Burnett, son époux, décédé le 21 avril 1925. Parmi les biens composant la succession de ce dernier se trouve la part de biens lui venant de la succession de sa grand-mère Sarah Caine. La quotité de cette part est l'objet de ce litige.

Décédée le 5 avril 1909, Sarah Caine laissa six enfants. Elle avait, par testament authentique en date du 20 mai

[1] [1962] B.R. 187.

1902, disposé de ses biens, incluant sa part de la communauté de biens avec feu son époux, Frederick Thomas Judah. Suivant ces dernières volontés, la testatrice, après avoir fait certains legs particuliers à chacun de ses enfants, disposa ainsi de tous ses immeubles, actions ou autres valeurs:

ELEVENTHLY.—I leave and bequeath all my real estate, bonds, stocks & ready money which I may possess at the time of my death, unto my six children Ida, Amy, Henry, Miriam, Frederick and Sarah, to be by them enjoyed in equal shares during their lifetime, they drawing the revenues, interest and dividends thereof respectively, without being obliged to make any inventory or to give security; and after their death, unto their children *par souche;* to be by my grandchildren, *par souche,* owned and enjoyed in full ownership; but the latter shall not have the right to ask for or to have any partition of my estate until after the demise of the last *souche.*

In the event of any *souche* dying without legitimate issue, I will and direct that his or her share shall accrue to the other *souches* in equal shares.

TWELFTHLY.—I will and ordain that the said usufruct or enjoyment of my said children shall be *inalienable* and *insaisissable* and in the case of the female children not under marital control.

Tous les enfants de la testatrice lui survécurent. Tous sont depuis décédés: Miriam en 1917, Ida en 1918, Frederick James en 1943, Amy en 1951, Henry en 1954 et Sarah en 1956. De tous les six, seules Miriam et Sarah eurent des enfants: la première, James Frederick Judah Burnett qui, comme déjà indiqué, devint l'époux de l'appelante et décéda le 21 avril 1925, et la seconde, trois enfants: Celeste, Ogden et Gordon Frederick Glass, tous trois intimés en cet appel.

L'appelante a poursuivi les trois intimés personnellement et les deux derniers également en leur qualité d'exécuteurs testamentaires.

Les autres intimés ès-qualité sont coexécuteurs du testament de Sarah Caine; les mis-en-cause sont héritiers de la succession de Frederick Thomas Judah, l'époux de Sarah Caine; enfin, le mis-en-cause ès-qualité est curateur aux substitutions qui auraient été créées par le testament de l'époux de cette dernière.

Par son action, l'appelante a demandé à ce qu'il soit ordonné aux défendeurs ès-qualité de procéder au compte et au partage de la succession de feu Sarah Caine et à ce qu'il soit déclaré qu'elle-même est propriétaire de la moitié

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et les défendeurs de l'autre moitié des biens de cette succession.

Toutes les parties ont comparu mais seuls les intimés contestent.

Tel qu'éventuellement arrêté et soumis par l'appelante et les intimés, la question à déterminer se limite à savoir si, comme elle le prétend, l'appelante est propriétaire de la moitié de la succession de Sarah Caine, ou simplement d'un cinquième, ainsi que le soumettent les intimés. Les parties s'accordent à reconnaître que le principe de la réponse à cette question se trouve dans les clauses 11 et 12 du testament de Sarah Caine. L'appelante, d'une part, soutient que la clause 11 comporte deux libéralités conjointes, savoir un legs d'usufruit aux enfants de la testatrice et un legs de nue propriété à ses petits-enfants par souche; la clause 12 étant invoquée par l'appelante au soutien de cette interprétation de la clause 11. Les intimés, d'autre part, soutiennent qu'aux termes de la clause 11, la testatrice a créé une substitution fidéicommissaire distincte pour chaque souche représentée par chacun de ses enfants. De plus et entre autres moyens additionnels, ils invoquent une loi de la Législature, 8 Geo. V, c. 139, où la justesse de leur interprétation aurait été implicitement reconnue et ils plaident chose jugée en s'appuyant sur un jugement, rendu en 1926 par feu M. le Juge Mercier dans une cause où la question fondamentale soulevée serait, de son essence, la même qu'en l'espèce, et suivant lequel le savant Juge, reconnaissant que la testatrice a créé une substitution, limita l'étendue des droits de l'appelante comme héritière de son époux, James Frederick Judah Burnett, à un cinquième des biens de la succession de Dame Sarah Caine.

En Cour supérieure, M. le Juge Salvas considéra que la clause 11 comporte deux libéralités distinctes et successives ayant pour objet la propriété des biens de la testatrice; que celle-ci y créa une substitution pour chacune des souches alors représentée par chacun de ses six enfants; que chacun d'eux reçoit une part de ses biens s'augmentant par accroissement, le cas échéant, en vertu du testament et de la loi (C.C. 933 et 868), avec charge de rendre cette part à ses propres enfants à son décès; qu'au décès de sa mère Miriam, l'époux de l'appelante fut immédiatement saisi de la pleine

propriété de la part de sa mère—soit un sixième—et, au même temps, du droit éventuel à l'accroissement stipulé au testament, recevant cette part et ce droit de la testatrice elle-même; que le 8 mars 1918, Ida étant décédée sans postérité, cette souche s'est éteinte et sa part s'est ajoutée par accroissement à celles des cinq autres souches dont celle de Miriam alors représentée ou continuée par l'époux de l'appelante, James Frederick Judah Burnett, cette part étant ainsi portée de un sixième à un cinquième en pleine propriété; que l'époux de l'appelante ayant, le 21 avril 1925, prédécédé les quatre autres enfants survivant à la testatrice, sans laisser d'enfants, son décès entraîna l'extinction de la souche Miriam et partant la perte du droit au bénéfice de l'accroissement effectué subséquemment entre les souches survivantes. Le savant Juge en conclut que, seule héritière de James Frederick Judah Burnett, l'appelante a été, lors du décès de ce dernier, saisie en pleine propriété de la part déjà acquise par son époux dans la succession de Dame Sarah Caine, soit un cinquième des biens de cette succession. Dans ces vues sur le sens et l'effet des clauses 11 et 12, le Juge de première instance n'eut pas à considérer les autres moyens soulevés par les intimés. Il ordonna le partage, déclara l'appelante propriétaire d'un cinquième, réserva l'adjudication, si nécessaire, des conclusions accessoires de l'action; le tout, chaque partie payant ses frais.

Ce jugement fut porté en appel et le dispositif en fut confirmé par une décision majoritaire. Voici, en substance, les vues auxquelles se sont arrêtés les membres de la Cour[1]. Sur le sens et l'effet du testament, MM. les Juges Bissonnette et Owen partagent entièrement l'opinion du Juge de première instance alors que MM. les Juges Casey, Rinfret et Badeaux se prononcent—le premier, pour partie, et les deux autres, pour le tout—en faveur des prétentions de l'appelante. MM. les Juges Bissonnette, Casey et Badeaux acceptent comme bien fondée la défense de chose jugée alors que, par ailleurs, M. le Juge Rinfret exprime l'opinion contraire et que M. le Juge Owen ne juge pas nécessaire de se prononcer, vu son opinion sur l'interprétation et l'effet du testament. Ainsi donc et dans le résultat, l'appel fut renvoyé avec dépens. De là le pourvoi à cette Cour.

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La distinction entre l'essence de la constitution d'usufruit et celle de la constitution de substitution fidéicommissaire est clairement exposée aux autorités citées aux raisons de jugement de M. le Juge Bissonnette. Il n'y a pas lieu d'y revenir; sur cette question de droit, il n'y a, entre les parties, aucune controverse. C'est sur l'appréciation des dispositions précitées du testament qu'on se divise et où l'on prétend apercevoir, d'une part, la présence des éléments de l'usufruit et, d'autre part, ceux de la substitution. Dans *Auger v. Beaudry*[1], le Comité Judiciaire du Conseil Privé a rappelé dans les termes suivants, à la page 1014, la méthode à suivre pour déterminer l'intention d'un testateur: «. . . it is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will.» Retenant ce critère et après avoir anxieusement étudié les raisons données en Cour supérieure, en Cour d'Appel, à la lumière de l'argumentation des parties lors de l'audition, je dois dire, en toute déférence pour les tenants de l'opinion contraire, qu'il m'est impossible, à moins de faire une certaine violence au texte de la clause 11, de voir aux dispositions testamentaires précitées la constitution d'un simple usufruit. Au contraire et d'accord avec les raisons données par M. le Juge Salvas, élaborées par MM. les Juges Bissonnette et Owen, et auxquelles je ne puis utilement ajouter, je dirais plutôt que, suivant son texte même, la clause 11 comporte deux libéralités distinctes, successives et non simultanées, chaque enfant de la testatrice recevant, en premier ordre, sa quote-part des biens et un droit éventuel d'accroissement, avec charge, à son décès, de rendre à ses propres enfants recevant en second ordre. En somme, la testatrice a créé une substitution fidéicommissaire distincte pour chaque souche représentée par chacun de ses enfants.

Ainsi donc, et dès le décès de sa mère, Miriam, en 1917, James Frederick Judah Burnett fut, comme appelé, saisi de la pleine propriété de la part de celle-ci dans la succession de la testatrice, soit un sixième, et de plus, du droit éventuel à l'accroissement pourvu au deuxième paragraphe de la clause stipulant:

> In the event of any *souche* dying without legitimate issue, I will and direct that his or her share shall accrue to the other *souches* in equal shares.

[1] [1920] A.C. 1010, 48 D.L.R. 356.

Au décès subséquent d'Ida, célibataire, en 1918, cette part de Burnett fut, par suite de cette disposition, portée à un cinquième. Burnett décéda lui-même sans postérité en 1925 entraînant ainsi l'extinction de la souche Miriam. Cette souche et la souche Ida étant éteintes, l'accroissement pourvu en la clause 11 ne pouvait désormais bénéficier éventuellement qu'aux quatre autres enfants survivants de la testatrice. L'appelante argumente que cette clause relative à l'accroissement ne dit pas «In the event of any *souche* dying without legitimate issue surviving», mais simplement «In the event of any *souche* dying without legitimate issue». Elle en déduit une intention de la testatrice d'accorder le bénéfice d'accroissement aux souches fertiles avec le résultat que les biens doivent être partagés également entre les deux souches ayant cette qualification, soit la souche Miriam et la souche Sarah. Cette interprétation n'est pas, à mon avis, justifiée par le texte et est, au surplus, comme le signale M. le Juge Owen, incompatible avec la manifeste intention de la testatrice d'attribuer ses biens en ligne directe à ses descendants et non à leurs époux.

Dans ces vues sur le sens et l'effet des dispositions du testament, il ne paraît pas utile de poursuivre la considération du litige pour décider du bien ou mal fondé des autres moyens invoqués de la part des intimés.

Je renverrais l'appel avec dépens.

Appel rejeté avec dépens.

Procureurs de la demanderesse, appelante: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montréal.

Procureurs des défendeurs, intimés: Lajoie, Gelinas, Lajoie, Bourque & Lalonde, Montréal.

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*Mar. 11
Jun. 24

J. G. FERNAND BISSONNETTE (*Défendeur*) ..... APPELANT;

ET

LA COMPAGNIE DE FINANCE LAVAL LIMITÉE *ET AL.* (*Demanderesse*) ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Immeubles—Hypothèque avec clause de dation en paiement—Faillite—Clause jouant automatiquement dans ce cas—Nature et effet de la dation—Créancier plus qu'un créancier garanti—Droit à la propriété—Effet sur les autres créanciers—Code Civil, arts. 1085, 1952—Loi sur la faillite, S.R.C. 1952, c. 14, arts. 2(r), 60.

Lorsqu'une requête en faillite fut présentée contre la compagnie Hôtel Lapointe Inc. celle-ci était propriétaire d'immeubles grevés d'un privilège de vendeur avec clause résolutoire et d'une hypothèque avec clause de dation en paiement. Dès avant cette date, la compagnie était en défaut de satisfaire à ses obligations. Avant que le jugement de la Cour d'appel confirmant l'ordonnance de séquestre ne soit rendu, la demanderesse devint cessionnaire du privilège de vendeur et de l'hypothèque avec la clause de dation. Après mise en demeure, la demanderesse présenta une requête en retrocession des immeubles en paiement de ses créances. Le juge de première instance donna effet à la clause de dation et déclara la demanderesse propriétaire incommutable. Ce jugement fut confirmé par la Cour du banc de la reine. Le syndic obtint permission d'appeler devant cette Cour.

La clause de dation se lit ainsi en partie: . . . qu'advenant le défaut par le débiteur de rembourser . . . alors, dans chacun de ces cas, le créancier aura droit de prendre l'immeuble ci-dessus en paiement de sa créance ou de toute partie d'icelle non alors acquittée . . . la présente clause de dation en paiement prenant effet automatiquement au cas où le débiteur ou l'un ou l'autre de ses représentants ferait cession de ses biens, serait mis en faillite ou tomberait sous le coup d'un concordat . . . Cette clause aura effet au choix de créancier, nonobstant toutes autres clauses antérieures.

Arrêt: L'appel doit être rejeté.

Le choix du créancier, mentionné à la fin de la clause, était celui de renoncer ou non à la dation automatiquement acquise par le fait de la faillite alors que dans les autres cas où la dation pouvait jouer, le choix était d'exiger ou de ne pas exiger la dation. Le débiteur avait conféré au créancier un droit de propriété conditionnelle sur les immeubles, droit devant prendre un caractère absolu rétroagissant à la date du contrat dès l'accomplissement de la condition, soit la faillite. Par conséquent, l'argument du syndic que le créancier aurait perdu le droit d'invoquer la clause de dation parce qu'il n'aurait pas

*CORAM: Les Juges Taschereau, Fauteux, Abbott, Martland et Judson

fait ou signifié son choix d'en prendre avantage, ne peut pas être retenu, puisqu'elle joue automatiquement dans le cas d'une faillite.

Il appartenait au syndic de faire la preuve que la demanderesse avait par ses actes renoncé à la dation en paiement. Cette preuve n'a pas été faite.

Les faits démontrent que les exigences de l'art. 50 de la *Loi sur la faillite*, prescrivant que le créancier doit fournir au syndic une preuve détaillée et assermentée de sa réclamation, ont été entièrement couvertes.

L'argument que la clause de dation en paiement vient en conflit avec l'esprit et les dispositions de la *Loi sur la faillite* régissant les droits d'un créancier garanti, ne peut être retenu. Le créancier d'une telle clause est plus qu'un créancier garanti au sens de l'art. 2(r) de la Loi. Sous notre droit, la dation en paiement équivaut à vente, le débiteur étant obligé de remettre une chose autre que celle qui était due en vertu de l'obligation. Dès l'avènement de la faillite, la demanderesse créancière avait acquis un droit à la propriété des immeubles revendiqués.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], affirmant un jugement du Juge Marier. Appel rejeté.

L. P. Gagnon, C.R., et *J. B. Carisse*, pour le défendeur, appelant.

J. P. Bergeron, C.R., et *P. E. Blain*, pour la demanderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—L'appelant, syndic à la faillite de Hôtel Lapointe Inc., ci-après appelé la compagnie ou la débitrice, se pourvoit en cette qualité à l'encontre d'une décision unanime de la Cour du banc de la reine[1] rejetant son appel d'un jugement du Tribunal des Faillites et ce pour les motifs exposés par M. le Juge Choquette et partagés par MM. les Juges Bissonnette, Hyde, Montgomery et Rivard.

Par ce jugement de la Cour supérieure siégeant en faillite, rendu le 28 juin 1961, M. le Juge Marier, donnant effet à une clause de dation en paiement dont les immeubles de la débitrice étaient affectés, en déclara l'intimée propriétaire incommutable et ordonna les radiations appropriées.

L'appelant a demandé et obtenu la permission de se pourvoir à cette Cour.

[1] [1963] B.R. 391.

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Il convient de relater sommairement les faits et les diverses procédures dans la perspective desquels se situent les questions de droit soulevées par l'appelant.

Quelque huit ans avant sa faillite, soit le 31 mars 1952, la compagnie acheta les immeubles en litige, assumant au contrat les charges dont ils étaient grevés, dont (i) un privilège de vendeur avec clause résolutoire, résultant d'un acte de vente du 30 mars 1950 et (ii) une hypothèque avec clause de dation en paiement, constituée par acte d'obligation passé le 3 octobre 1951. A la date de la requête en faillite, le 23 février 1960, ces immeubles étaient encore grevés de ces droits réels pour des montants considérables. La compagnie était de plus en défaut de faire des versements substantiels sur le capital; des intérêts étaient dus; enfin, les taxes scolaires qui n'avaient pas été payées depuis 1956 s'arrérageaient à la somme de $33,231.45, le 21 juin 1961, lors de l'enquête sur la requête en rétrocession. Ainsi donc, et dès avant la faillite, la compagnie était en défaut de satisfaire aux obligations par elle assumées lors de l'acquisition des immeubles en 1952 et ce défaut donnait au créancier du privilège de vendeur et au créancier de l'hypothèque le droit d'invoquer respectivement la clause résolutoire et celle de dation en paiement.

La requête en faillite, comme déjà indiqué, fut présentée le 23 février 1960 alors que l'appelant fut nommé séquestre intérimaire des biens de la débitrice. Le 5 avril suivant, l'ordonnance de séquestre fut rendue contre la compagnie et l'appelant fut nommé syndic à la faillite. La compagnie interjeta appel du jugement la déclarant en faillite et ce n'est que quelque sept mois plus tard, soit le 16 novembre 1960, que cet appel fut rejeté par la Cour du banc de la reine.

Alors que cet appel était pendant, l'intimée, la Compagnie de Finance Laval Ltée, devint cessionnaire des créances résultant (i) de l'acte de vente du 30 mars 1950, dont le privilège de vendeur, et (ii) de l'acte d'obligation du 3 octobre 1951, dont l'hypothèque avec clause de dation en paiement, le tout en vertu d'actes de cession et transport signifiés à la débitrice. Dans le même intervalle, par lettre du 26 avril 1960, l'intimée, invoquant le défaut de la débitrice d'exécuter les obligations par elle assumées, le fait de

l'ordonnance de séquestre rendue contre elle et la clause de dation en paiement, la mit en demeure de lui consentir la rétrocession des propriétés susdites en paiement de ses créances.

Subséquemment au jugement de la Cour d'Appel maintenant l'ordonnance de séquestre, l'appelant fut confirmé dans sa fonction de syndic, à la première assemblée des créanciers, tenue le 29 novembre 1960. Le 16 mars suivant, il demanda au Tribunal des Faillites que tous droits de l'intimée de réaliser ses garanties soient différés jusqu'au 16 mai 1961, et obtint, le lendemain, une ordonnance intérimaire ayant cet effet jusqu'à adjudication sur sa demande. Celle-ci fut accueillie le 18 avril 1961, vu le consentement de l'intimée qui avait elle-même logé, le 12 avril 1961, la requête en rétrocession qui nous occupe. Suspendue, avec l'acquiescement de l'appelant, il ne fut procédé à cette dernière requête que le 20 juin 1961. Dans l'intervalle, l'appelant demanda, le 27 avril 1961, l'autorisation du tribunal de vendre de gré à gré les immeubles en litige à une personne qui s'était engagée, moyennant certaines conditions, à s'en porter acquéreur et à signer un contrat de vente dans les trente jours de l'acceptation de son offre. L'intimée consentit à jugement sur cette requête mais sous la réserve expresse que ce consentement était donné sans préjudice à son droit de contester, advenant—comme ce fut le cas—la non réalisation de la vente proposée, certaines allégations de la requête mettant en question son droit à la dation en paiement.

Postérieurement à ces procédures, la requête en rétrocession fut entendue au mérite et, comme déjà indiqué, trouvée bien fondée, tant en Cour de première instance qu'en Cour d'Appel.

D'où le présent pourvoi.

Il convient de citer au texte la clause de dation en paiement sur laquelle se fonde le jugement *a quo*, d'en souligner les parties essentielles, omettant des diverses circonstances en conditionnant l'application, celles qui n'ont aucune pertinence en l'espèce:

> Il est expressément compris, sans quoi les présentes n'auraient pas été consenties par le créancier, qu'advenant le défaut par le débiteur de rembourser à échéance le capital emprunté ou tout versement sur icelui

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convenu; ou de payer ses taxes avant le premier janvier de chaque année; ou si le débiteur faisait défaut de .....
.....
alors, dans chacun de ces cas, le créancier aura droit de prendre l'immeuble ci-dessus en paiement de sa créance ou de toute partie d'icelle non alors acquittée, duquel immeuble il sera et demeurera propriétaire incommutable sans aucune indemnité, ni sans aucun remboursement pour deniers déjà reçus ou pour toutes impenses et améliorations apportées audit immeuble, lequel sera et devra être considéré comme franc et quitte de toutes charges, dettes et hypothèques subséquentes au présent acte d'obligation, *la présente clause de dation en paiement prenant effet automatiquement au cas où le débiteur ou l'un ou l'autre de ses représentants ferait cession de ses biens, serait mis en faillite ou tomberait sous le coup d'un concordat.* Tous locataires, tiers détenteurs ou créanciers subséquents dudit immeuble seront sujets et soumis non seulement à l'hypothèque consentie en faveur dudit créancier, mais à toutes les clauses insérées au présent acte et sujet à la clause de dation en paiement mentionnée plus haut, laquelle constitue et confère dans tous les cas, sur l'immeuble susdésigné et dépendances, en faveur du créancier, un droit «in re», immédiat, rétroactif, «hic et nunc», dans le cas où le créancier demanderait la propriété du débiteur en paiement de sa créance. Cette clause aura effet au choix du créancier, nonobstant toutes autres clauses antérieures.

A l'audition, le syndic a soumis en substance les arguments suivants au soutien de son appel.

Il a d'abord prétendu qu'aux termes de la dernière phrase de la clause précitée, le jeu de cette clause est conditionné à la signification au débiteur du choix du créancier d'en prendre avantage; que ce choix n'aurait pas été fait ou signifié; il en conclut que la clause est demeurée sans effet et que le créancier a perdu le droit de l'invoquer. Pour écarter cette conclusion, il suffit de dire qu'à tout le moins la première des prémisses sur laquelle elle repose n'est pas fondée dans le cas de la faillite du débiteur, l'un des cas prévus pour l'application de la clause. Il est, en effet, clairement stipulé que dans ce cas la clause opère «automatiquement». Il faut donner effet à cette stipulation et pour ce faire interpréter cette dernière partie de la clause non pas en la considérant isolément mais avec les autres parties du contexte, en donnant à chacune le sens qui résulte de la clause entière. Ainsi considérée, il apparaît, comme s'en exprime M. le Juge Choquette avec l'accord de tous ses collègues, que le choix du créancier, mentionné à la fin du texte, serait le choix de renoncer ou de ne pas renoncer à la dation en paiement automatiquement acquise par le fait de la faillite alors que, dans les autres cas où il peut y avoir lieu à dation en paiement, ce choix serait d'exiger ou de ne

pas exiger la dation en paiement. Cette interprétation est vraiment la seule susceptible de donner effet à la volonté exprimée des parties. Celles-ci ont envisagé et réglé d'avance, par contrat, le sort des immeubles dans l'éventualité d'une faillite du débiteur. Par cette clause, ce dernier a conféré au créancier un droit de propriété conditionnel sur les immeubles affectés, droit prenant un caractère absolu rétroagissant à la date du contrat dès l'accomplissement de la condition, soit l'avènement d'une faillite. Par la même clause, le débiteur a accordé au créancier la faculté de renoncer à son gré au droit ainsi conféré. Ce premier argument ne peut donc être retenu.

Mais, poursuit l'appelant, l'intimée a par ses actes renoncé à la dation en paiement. Cette renonciation, dit-il, résulterait virtuellement (i) du consentement donné par l'intimée à l'ordonnance du 18 avril 1961 requise par le syndic pour faire différer à deux mois l'exercice des droits de l'intimée, (ii) du consentement de cette dernière au jugement du 27 avril accueillant la requête du syndic pour la vente des immeubles en question, et (iii) du fait que l'intimée aurait fait parvenir au syndic un relevé de compte daté le 31 mai 1961 indiquant le montant de la dette de la débitrice au 2 juin 1961. Le premier de ces consentements fut donné alors que la requête en rétrocession était et demeurait pendante; de plus, l'audition de cette requête fut suspendue avec l'acquiescement de l'appelant. Le second fut donné à la condition expresse que la vente projetée soit conclue et sans préjudice au droit de l'intimée de contester certaines allégations de la requête du syndic mettant en doute le droit de l'intimée à la dation en paiement, advenant le cas où la vente n'aurait pas lieu, ce qui, en fait, s'est produit. Quant au relevé de compte, l'appelant ne paraît pas en avoir fait état en Cour d'Appel. Il a été produit en preuve par l'appelant, sous réserve des objections de l'intimée, relativement à une question étrangère à la suggestion d'une renonciation. Le dossier ne révèle d'ailleurs aucune circonstance permettant d'inférer raisonnablement en l'espèce une renonciation du fait de son envoi au syndic. Pour ces raisons et celles données en Cour d'Appel, je dirais qu'il appartenait à l'appelant de faire la preuve de la renonciation et que cette preuve n'a pas été faite.

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D'après une autre prétention de l'appelant, la requête en rétrocession serait prématurée et partant mal fondée parce que l'intimée n'aurait pas fourni au syndic une preuve détaillée et assermentée de sa réclamation, suivant les formalités prescrites à l'art. 50 de la *Loi sur la faillite*. Le syndic, comme on l'a noté en Cour d'Appel, s'est tenu suffisamment informé de la réclamation de l'intimée et de la preuve au soutien; il avait évidemment pris connaissance des titres de l'intimée et de la lettre du 26 avril 1961 adressée par ce dernier à sa débitrice pour demander la rétrocession des immeubles affectés; par sa requête du 16 mars 1961, il avait demandé que soit différé l'exercice des droits de l'intimée afin de pouvoir vendre lui-même les immeubles revendiqués; par sa requête du 27 avril 1961, c'est lui qui prend encore l'initiative de s'adresser au tribunal pour faire décider en somme que l'intimée n'a pas droit à une dation en paiement. Ces deux requêtes contiennent une description complète des immeubles en litige et des droits qui les grèvent. De tous ces faits, la Cour d'Appel a conclu, avec justesse, que les exigences de l'art. 50 ont été entièrement couvertes.

Enfin, et c'est là le principal argument soumis à l'audition, même si la clause de dation en paiement contient une stipulation à l'effet qu'elle joue automatiquement dans le cas d'une faillite, une telle clause, dit l'appelant, est ineffective parce qu'elle est incompatible avec l'esprit de la *Loi sur la faillite* dont l'une des fins est de protéger la masse des créanciers et empêcher que les uns bénéficient d'avantages indus au détriment des autres, et que, valide sous le *Code Civil*, elle est en conflit avec les dispositions de la *Loi sur la faillite* régissant aux fins ci-dessus les droits d'un créancier garanti. Rejetant cet argument, la Cour d'Appel a jugé qu'il n'y avait, dans le présent cas, aucun conflit entre la *Loi sur la faillite* et le *Code Civil*, que l'intimée est en l'espèce plus qu'un créancier garanti au sens de l'art. 2(*r*), qu'elle a acquis un droit à la propriété des immeubles revendiqués et que, d'ailleurs, le syndic n'a offert aucun rachat de ce qu'il appelle la «garantie» de l'intimée.

Au soutien de sa prétention, l'appelant a particulièrement invoqué, en cette Cour comme en Cour d'Appel, les décisions rendues par la Cour supérieure de la Province de Québec dans les causes suivantes: *Laplante, Perras et Berthe*

Roberto 1953 Montréal C.S. 141 (non rapportée), Beauchatel Construction Inc. v. Poissant[1], et *Ireland, Breton v. Gingras et al.*[2] Une étude attentive de ces décisions aussi bien que de l'argumentation de l'appelant révèle que l'une des prémisses essentielles sur lesquelles elles se fondent est qu'on considère le créancier d'une telle clause comme un créancier garanti au sens de l'art. 2(*r*) de la *Loi sur la faillite* et qu'on justifie ainsi l'application des dispositions de cette loi autorisant le rachat de la garantie pour assurer que le patrimoine du failli reçoive le profit du surplus de sa valeur, au bénéfice de la masse des créanciers. L'article 2(*r*) définit ainsi le créancier garanti:

> «créancier garanti» signifie une personne qui détient un mortgage, une hypothèque, un nantissement, une charge, un gage ou un privilège sur ou contre les biens du débiteur, ou toute partie de ces biens, à titre de garantie d'une dette échue ou à échoir du débiteur envers lui, ou une personne dont la réclamation est fondée sur, ou garantie par, un instrument négociable détenu en garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement;

Manifestement, on ne saurait, en vertu de la deuxième partie de cette définition, considérer l'intimée comme créancière garantie en raison de la dation en paiement qu'elle invoque. Et pour que l'intimée soit ainsi considérée, en vertu de la première partie, il faudrait que cette clause constituât—ce qui n'est pas—l'une des formes de sûretés réelles qui y sont énumérées et qui permettent à leurs bénéficiaires de réclamer un droit de préférence sur le prix de vente des biens qui en sont affectés, de se faire payer leur dette à même ce prix avant les autres créanciers et d'échapper ainsi à la loi du concours régissant les créances chirographaires, suivant l'art. 1981 du *Code Civil*. Au contraire et par cette clause, la débitrice, comme déjà indiqué, a conféré au créancier, non pas un droit de préférence accessoirement à un droit principal, mais un droit de propriété conditionnel sur les immeubles affectés, droit prenant un caractère absolu rétroagissant à la date du contrat dès l'accomplissement de la condition, soit, en l'espèce, l'avènement de la faillite. *Art. 1085 du Code Civil. La Caisse Populaire de Scott v. Guilmette*[3]. Dans Planiol et Ripert, 2e éd., Droit Civil, vol. 7, p. 658, on définit la dation en paie-

[1] [1961] C.S. 145, 1 C.B.R. (N.S.) 279.
[2] [1962] C.S. 95, 3 C.B.R. (N.S.) 162.
[3] [1962] B.R. 293.

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Fauteux J.

ment et on en analyse la nature. La tenant, non comme une sûreté réelle garantissant une obligation mais comme mode d'extinction d'obligation, on la rapproche du paiement ou on la ramène à la novation par changement d'objet ou encore à une vente donnant lieu à compensation, l'auteur ajoutant que, sous ce dernier aspect, «Tout se passe comme si le débiteur vendait un bien à son créancier pour un prix égal au montant de sa dette; le créancier devient propriétaire de la chose et le débiteur du prix; la compensation vient éteindre aussitôt sa dette du prix et la dette dont était tenu le débiteur.» Sous notre droit, la dation en paiement équivaut à vente. *Art. 1592 du Code Civil.* En somme, la débitrice, en consentant à cette clause s'est obligée, advenant sa faillite, à remettre en paiement à son créancier une chose autre—soit les immeubles—que celle qui était due en vertu de l'obligation. En exigeant la clause au contrat, le créancier a pu avoir en vue d'assurer la protection de son patrimoine, mais ceci ne fait pas du moyen qu'il a pris pour ce faire l'une des sûretés réelles mentionnées dans la définition du créancier garanti. Aussi bien et d'accord avec la Cour d'Appel, je dirais que l'intimée est, par suite de cette clause qu'elle invoque, en raison de la faillite, plus qu'une créancière garantie et qu'elle a acquis un droit à la propriété des immeubles revendiqués.

L'appelant a fait état de la rigueur de cette clause dont il a par ailleurs reconnu la validité, plaidant simplement son inefficacité en raison de la *Loi sur la faillite.* Il n'appartient pas aux tribunaux mais au Législateur d'y apporter des tempéraments, si et dans la mesure où il le juge à propos.

Je rejetterais l'appel avec dépens.

Appel rejeté avec dépens.

Procureurs du défendeur, appelant: E. Lafontaine et J. Bernard Carisse, Montréal.

Procureurs de la demanderesse, intimée: Blain, Piché, Bergeron, Godbout & Emery, Montréal.

HER MAJESTY THE QUEEN .....APPELLANT;

1963

*Jun. 4
Oct. 1

AND

SYDNEY LERNER AND BUCKLEY'S WHOLESALE TOBACCO LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Lotteries—Mail order product distribution plan—Whether scheme contrary to s. 179(1)(e) of the Criminal Code, 1953-54 (Can.), c. 51.

The respondents conducted a mail order product distribution plan whereby a participant received three cards which he sold to three friends for $4 each. The participant returned the three cards to the respondents, each card bearing the name and address of one of the friends, together with $12. The original participant would then receive three cartons of cigarettes of his choice. The three friends in turn would receive three cards each and, after repeating the same procedure of selling their cards, would each receive three cartons of cigarettes.

The respondents were charged under s. 179(1) (*e*) of the *Criminal Code* with conducting a scheme by which any person, upon payment of any sum of money, could become entitled under the scheme to receive a larger sum of money or amount of valuable security than the sum paid by reason of the fact that other persons had paid any sum of money under the scheme. The respondents were convicted, but their convictions were quashed by the Court of Queen's Bench. The Crown appealed to this Court.

Held: The appeal of the Crown should be dismissed.

A participant in the scheme did not receive anything which falls within the term "valuable security" within the meaning of s. 179(1)(*e*) of the Code.

Even if it could be held, contrary to what was decided by the Court of Queen's Bench, that what the participant obtained under the scheme could be regarded as constituting valuable security, the scheme would not be in contravention of s. 179(1)(*e*) of the Code. The essence of the scheme was that the respondents were prepared to compensate, in the form of goods, at their own expenses, for the performance of services, such as advertising and distribution of their products, which they obviously considered to be of value to them. The scheme did not, therefore, fall under s. 179(1)(*e*) of the Code.

APPEAL by the Crown from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], quashing the respondents' convictions on a charge of conducting a lottery. Appeal dismissed.

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Ritchie JJ.

[1] [1963] Que. Q.B. 91, 39 C.R. 347.

1963

THE QUEEN v. LERNER et al.

R. Larivée, Q.C., for the appellant.

F. Kaufman, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1], which unanimously maintained the present respondents' appeals against their convictions on charges laid against them under s. 179(1)(*e*) of the *Criminal Code* which provides as follows:

> 179. (1) Every one is guilty of an indictable offence and is liable to imprisonment for two years who
>
> * * *
>
> (*e*) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, upon payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation, to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;

The scheme conducted by the respondents in respect of which the charges were laid is described in agreed admissions of fact as follows:

> At material times the above company (i.e. Buckley's Wholesale Tobacco Ltd.) has conducted a mail order product distribution plan that operates as follows:
>
> *a*) A number of people each receive a written explanation of the company's operation and an offer to participate in that operation, together with three (3) identical beige coloured cards.
>
> *b*) Each of the above persons may then explain the company's operation to friends, and sell each of the three cards to a friend for a price of $4.00.
>
> *c*) Upon returning the three cards (now completed, with each one bearing the name and address of a new customer) along with the $12.00 collected ($4.00 for each of the 3 cards) to the company, the company sends to the original customer three (3) cartons of cigarettes (of the brand chosen by him), and it sends to each of his friends who has paid $4.00, i.e. each new customer, a set of 3 cards.
>
> *d*) Each of the above mentioned participants can then sell his three cards at a price of $4.00 each, and upon sending the completed cards

[1] [1963] Que. Q.B. 91, 39 C.R. 347.

back to the company, receives in turn three cartons of cigarettes (of the brand he chooses).

e) Thus the orginal participants receive three cartons of cigarettes in return for having sold the 3 cards sent to them, and each subsequent participant receives 3 cartons of cigarettes in return for having purchased a set of cards for $4.00 and having sold those cards to three of his friends.

f) Participants who succeed in selling 2 cards, but have difficulty with the third, can return their 2 completed cards (together with the $8.00 collected) to the company, and receive in return 2 instead of 3 cartons of cigarettes. If they then succeed in selling the third card, they receive a third carton of cigarettes.

g) Participants who have bought a set of cards (for $4.00) but who seem to be unsuccessful in selling them are given the opportunity of returning their uncompleted cards to the company, and of choosing a premium from a number of items offered to them by the company, thereby eliminating any chance of loss to them.

h) Participants may substitute various other products for cigarettes.

i) Participants who sell their cards promptly may receive special bonuses.

The instruction sheet sent by the respondents to their customers read as follows:

Dear Customer:—

Enclosed you will find 3 cards for which you have paid $4.00.
Please follow these instructions:

(1) Sell these 3 cards to your customer friends at $4.00 each.

(2) Mail us the 3 cards with the $12.00.

We will then mail you the 3 cartons of cigarettes (of your choice), plus 9 cards for distribution to your 3 customer friends. They, in turn, will sell these 3 cards to their friends at $4.00 each and will then receive their 3 cartons of cigarettes.

Yours very truly,
BUCKLEY'S WHOLESALE
TOBACCO LIMITED.

P.S. Do not send cash through the mail. Send money order only, this being your receipt.

In the reasons for the judgment from which this appeal is brought, it was held that a participant in this scheme does not receive anything which falls within the term "valuable security" within the meaning of s. 179(1)(*e*) and, in consequence, as a participant does not receive a sum of money or valuable security, the scheme did not contravene that paragraph. I am in agreement with this conclusion.

Furthermore, I do not think that the scheme would contravene that paragraph even if that which a participant obtains under it could be regarded as constituting valuable security. His entitlement to receive property under the scheme does not arise merely by his payment of money and

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Martland J.

the property to which he becomes entitled is not received by him "by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation".

This is not a scheme such as that which was considered by this Court in *Dream Home Contests (Edmonton) Limited v. R.*[1], under which a number of people purchased tickets and the winner received a prize substantially more valuable than the amount which he had paid for the ticket, as a result of the moneys paid for the tickets paid for by the other contestants. In the present case the typical participant does not become entitled to obtain his cartons of cigarettes or other products upon payment of the $4.00 fee. It is also necessary for him to persuade three other persons to enter into the arrangement which he himself has made. He thereby renders a service to the respondent company which, in turn, derives a benefit by reason of the wider advertising and distribution of the products which it has for sale and for which service it is prepared to compensate the participant in the form of goods of a value exceeding the $4.00 fee. While the scheme in question here is different from that which was considered by this Court in *R. v. The Procter and Gamble Company of Canada, Ltd.*[2], and while the charge in that case was laid under different paragraphs of s. 179(1), the reasoning in that case is, I think, also applicable to the present one. The essence of the matter is that the respondent company is prepared to compensate, in the form of goods, at its own expense, for the performance of services which it obviously considers to be of value to itself. It is not conducting a scheme whereby a prize can be won by a contestant which is provided out of the funds obtained from other contestants under the scheme.

For these reasons, in my opinion, the appeal should be dismissed.

Appeal dismissed.

Attorney for the appellant: R. Larivée, Montreal.

Attorney for the respondents: J. Cohen, Montreal.

[1] [1960] S.C.R. 414, 33 C.R. 47.
[2] [1960] S.C.R. 908, 34 C.R. 144, 34 W.W.R. 82, 128 C.C.C. 340.

HER MAJESTY THE QUEEN .....APPELLANT;

1963

*Mar. 18
Oct. 1

AND

M. GELLER INCORPORATED .....RESPONDENT.

Taxation—Excise Tax—Tax paid on dressed sheepskins not legally owing —Petition of right to recover amount paid—Whether refundable to dresser or to dealer who reimbursed dresser—Statutory delay for claim—Excise Tax Act, R.S.C. 1927, c. 179, ss. 80A, 105(6).

Pursuant to s. 80A of the *Excise Tax Act*, N Co. paid some $20,000 in excise tax on dressed sheepskins delivered to the respondent G Co., a dealer in sheepskins. Shortly before that time, this Court had ruled in another case that "mouton" was not a fur within the meaning of s. 80A. By petition of right both companies claimed a refund of the tax, now admitted not to have been legally owing. It was admitted also that G Co. had reimbursed to N Co. the tax which the latter had paid.

The trial judge dismissed the petition of N Co. on the ground that the claim was not within the two-year period provided by s. 105(6) of the Act, but maintained the petition of G Co. because "the right to claim a refund is open to any person who has paid moneys which have been taken to account as taxes imposed by the Act." The Crown appealed to this Court, but N Co. did not.

Held: The appeal should be allowed, except for a small amount admitted to have been paid by the respondent on imports.

Under the Act, the person obliged to pay the tax is the dresser and the person entitled to a refund is the dresser if the tax has been erroneously paid. In this case, the dresser's claim had been rightly denied by the Exchequer Court in view of the terms of s. 105(6) of the Act.

The respondent, G Co., had no legal right to claim a refund, even though it reimbursed the dresser for the tax paid. The arrangements between the two companies were *res inter alios acta* and could not affect the rights of the Crown.

APPEAL by the Crown from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], maintaining a petition of right claiming a refund of excise tax paid. Appeal allowed.

Paul Ollivier, Q.C., for the appellant.

J. J. Spector, Q.C., and *S. L. Mendelsohn, Q.C.*, for the respondent.

The judgment of the Court was delivered by

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Judson JJ.

[1] [1960] Ex. C.R. 512, 60 D.T.C. 1189.

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THE QUEEN v. M. GELLER INC.

TASCHEREAU J.:—Section 80A, c. 179 (R.S.C. 1927 and amendments) provides that:

> 80A. 1. There shall be imposed, levied and collected, an excise tax equal to twenty-five per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—
>
> (i) imported into Canada, payable by the *importer* or transferee of such goods before they are removed from the custody of the proper customs officer; or
>
> (ii) dressed, dyed, or dressed and dyed in Canada, payable by the *dresser* or *dyer* at the time of delivery by him.
>
> 2. Every person liable for taxes under this section shall, in addition to the returns required by subsection one of section one hundred and six of this Act, file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of dressed furs, dyed furs, and dressed and dyed furs for the last preceding business day, under such regulations as may be prescribed by the Minister.
>
> 3. The said return shall be filed and the tax paid not later than the first business day following that on which the deliveries were made. . . .

The respondent M. Geller Inc. is a dealer in sheepskins, and some of this material was dressed in Canada by Nu-Way Lambskin Processors Ltd., both firms operating in the city and district of Montreal.

Nu-Way, as dresser was responsible for the payment of the tax under s. 80A, and paid $20,011.72 to Her Majesty the Queen, and on March 8, 1957, the present respondent and Nu-Way filed a Petition of Right claiming from Her Majesty the Queen the sum of $20,956.74. It is argued that the tax imposed on dressed furs in Canada is illegal because sheepskin is not a fur falling within the meaning of the Act. It is admitted by all parties that M. Geller Inc. reimbursed to Nu-Way the sum of $20,956.74 paid to Her Majesty the Queen by the latter.

Both Nu-Way and the respondent M. Geller Inc. claimed a refund of the amount paid. The respondent in the present case alleged that it was the only one that was required to pay the tax, that it paid the tax through the intermediary of Nu-Way Lambskin and that, having made a demand for refund in writing within two years from the date of payment, as required by the Act, it was entitled to such a refund.

The learned trial judge[1] dismissed the Petition of Right of the suppliant Nu-Way Lambskin on the ground that it

[1] [1960] Ex. C.R. 512. 60 D.T.C. 1189.

failed to apply for a refund within the statutory delay. Section 105(6) provides as follows:

> 105(6) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The claim of the respondent however was maintained on the ground that the right to claim a refund is open to any person who has paid moneys which have been taken to account as taxes imposed by the Act and that the evidence established that the respondent is in fact the person who paid the moneys in question to Her Majesty.

It is clear and admitted that the said sum of $20,956.74 was paid as tax and that it was not legally owing, as this Court decided in several cases and particularly in *Universal Furs Dressers and Dyers Ltd. v. Her Majesty the Queen*[1]. In that case it was held by this Court that mouton was not fur and, therefore, not taxable under s. 80A of the *Excise Tax Act*. Before this Court Nu-Way did not appeal, and we are concerned therefore only with the appeal of Her Majesty the Queen against the present respondent.

I have reached the conclusion that this appeal should be allowed and the Petition dismissed in part.

The person obliged to pay the tax is the dresser, and the person entitled to a refund is the dresser if the tax has been paid through mistake of law or fact. In the present case, the tax was paid by the dresser Nu-Way and it was the sole person entitled to a refund. This was denied by the Exchequer Court, and rightly in view of the terms of s. 105, para. 6.

The respondent has no legal right to claim. It is true that M. Geller Inc. reimbursed Nu-Way, but this payment does not give a right of action to the former, which the law denies.

The arrangements made between Geller and Nu-Way are of no concern to the appellant. They are "res inter alios acta" and cannot affect the rights of the Crown.

The appeal must therefore be allowed with costs, and the Petition dismissed except as to an amount of $945.02. It is

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.

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THE QUEEN v. M. GELLER INC.

Taschereau J.

conceded by the appellant that this sum was paid as excise duty on imports brought into Canada from the United States of America, and that it must be refunded.

The appellant will pay the costs in the Exchequer Court.

Appeal allowed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: J. J. Spector and S. L. Mendelsohn, Montreal.

1963

*Oct. 22, 23
Dec. 16

WILLIAM JOHN FIELD, FIELD'S INDUSTRIAL RESEARCH LTD., FIELD'S WHOLESALE DISTRIBUTORS LTD. AND FIELD'S ENTERPRISES LTD. (*Defendants*) ..... APPELLANTS;

AND

BRUCE ZIEN AND FIELD'S WELDING SUPPLIES LTD. (*Plaintiffs*) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Breach—Right to rescind claimed—Seriousness of defective performance—Case one for damages and not rescission.

The defendant F had a business for the sale and distribution of welding supplies which he sold to the plaintiff Z. One of the terms of the agreement of sale was that at the time of closing, the cash, accounts receivable and inventory would exceed the accounts payable by at least $109,865. At the closing date, the balance was less than this sum by approximately $14,000. The plaintiff, after being in possession of the business for eleven weeks, claimed the right to rescind. He secured this relief at trial and held it on appeal, one member of the Court dissenting. The defendant appealed to this Court.

Held: The appeal should be allowed.

In deciding whether the remedy is rescission, with all its consequences or damages, the emphasis should be on the seriousness of the defective performance in the particular contract. While not saying that the breach in the present case was trivial it was necessary to weigh its commercial importance and, having regard to the amount of the shortage, the ascertainable probability of its occurrence at the time of the formation of the contract, the amount involved in the contract and the holdback of the final payment of $50,000 for four months,

*PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

this was a case for damages and not rescission. To follow this course was not to compel the plaintiff to accept something which differed in an important way from that which he contracted to buy. If the $14,000 were put into the company or if the plaintiff paid $14,000 less, he would be fully compensated.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Brown J. Appeal allowed.

V. R. Butts, for the defendants, appellants.

M. M. Grossman, Q.C., and *D. R. Sheppard,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

JUDSON J.:—I will refer to the parties to this litigation as Field, on the one hand, and Zien, on the other. Field had a business for the sale and distribution of welding supplies which he sold to Zien. One of the terms of the agreement of sale was that at the time of closing, the cash, accounts receivable and inventory would exceed the accounts payable by at least $109,865. At the closing date, the balance was less than this sum by 14,000 odd dollars. Zien, after being in possession of the business for eleven weeks, claimed the right to rescind. He secured this relief at trial and held it on appeal[1], Davey J.A. dissenting. Field now appeals to this Court.

The case was pleaded as one of misrepresentation on five grounds, all of which the trial judge rejected. He did, however, find another misrepresentation that was not pleaded. This, in turn, was rejected by the Court of Appeal. We are, therefore, in this position at this stage, that no misrepresentations have been proved and the argument addressed to us fails to persuade me that there was any error on this point.

The Court of Appeal was asked to dismiss the action on this ground alone but all the judges held, correctly in my opinion, that it was still open to the trial judge and to them to consider the effect of clause 5.3 of the contract which I have summarized above. Clause 5.3 of the contract reads:

As at the closing hour the aggregate of cash on hand and at bank valued at par, trade accounts receivable at book value before allowance for doubtful accounts and inventory at lower of cost or market will

[1] (1963), 43 W.W.R. 577.

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W. J. FIELD *et al.* v. B. ZIEN *et al.*

Judson J.

exceed the accounts payable, the principal amounts owing on the contracts described in paragraphs 5.8.1 and 5.8.2 and the amount payable by you under paragraph 4.6.5 and accrued liabilities of the companies by at least $109,865.00.

The contract took the form of a letter from Field to Zien giving him an option to buy. It is dated February 7, 1961, and recites the payment on that date of $1,000 for the option. Zien was to exercise the option before February 26, 1961, by written notice, together with a certified cheque for $24,000. He did this. On the exercise of the option a binding contract for sale and purchase was to come into existence. The price was $175,000, of which $25,000 had already been paid, and a further $100,000 was to be paid at the closing hour (8.30 a.m. March 1, 1961) and the balance of $50,000 four months after the closing hour. Zien paid the $100,000 on the due date and Field transferred the assets of the business. In mid May 1961 the parties discovered that the balance of current assets over current liabilities was approximately $14,000 short of the figure stated in paragraph 5.3. On May 19, 1961, Zien gave notice of rescission of the contract and tendered the business and assets back to the appellants. When the tender was rejected he issued his writ claiming rescission on the ground of misrepresentation, the return of his $125,000 and damages and indemnity and, in the alternative, damages for breach of contract.

Misrepresentation has now disappeared as an issue in this litigation. All the judgments of the Court of Appeal were founded upon the effect of clause 5.3. This is a term of the contract which promises that on a certain date the working capital will be not less than a certain figure. Both the trial judge and the majority of the Court of Appeal have held that Zien is automatically entitled to rescission because the working capital did not reach that figure on that date. The trial judge said:

> As to this the defendant says that he is willing to have the purchase price cut by the amount of the deficiency and submits that the clause ought to be interpreted to give him this doubtful privilege. But the predecessor of this clause in an earlier draft specifically drawn to provide for this was rejected on behalf of the plaintiff. It ought to have been evident to the accounting advisers of both the plaintiff and defendant that the so-called planned expansion of the company would make literal compliance with 5.3 impossible; nevertheless the defendant accepted this clause prefaced by he words "we warrant and represent to you and covenant with you that", and I must reluctantly hold that the defendant is thereby trapped. . . .

In my opinion the conclusion reached by the trial judge does not follow logically from the breach. In deciding whether the remedy is rescission, with all its consequences or damages, the emphasis should be on the seriousness of the defective performance in the particular contract. Nothing in the way of clarity is gained by attaching a label to the clause. The case for Zien, once the element of misrepresentation goes, is that clause 5.3 is a promise that during the period in question the business would show a profitable operation from September 30, 1960, the date of the last balance sheet, to the date of closing. I cannot draw this inference from the clause. Zien knew that there had been material changes in the business since September 30, 1960, such as:

(a) the occupation of larger premises;

(b) the taking on of new lines and the expansion of old lines;

(c) additional personnel;

(d) reduction in cartage income;

(e) the setting up of a repair shop; and

(f) an increase in inventory.

These changes involved non-recurring capital expenses of some $11,000 which were involved in the figure stated in clause 5.3, increases in regular operating expenses and non-recurring expenses in re-organizing and moving the business. All these factors contributed to the deficiency of $14,000 and might have been foreseen by either party. Indeed, the learned trial judge says that the planned expansion ought to have made it apparent to the accountants of both parties that literal compliance with the clause would be impossible.

In these circumstances and with the last $50,000 of the purchase price made payable four months after closing, one cannot gather any intention that the parties contemplated that a breach such as the one in question here would give a right of rescission. A breach of this clause might be trivial or serious. I am not saying that this breach is trivial but one must weigh its commercial importance and, having

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Judson J.

regard to the amount of the shortage, the ascertainable probability of its occurrence at the time of the formation of the contract, the amount involved in the contract and the holdback of the final payment of $50,000 for four months, my conclusion is that the case is one for damages and not rescission, and that to follow this course is not to compel Zien to accept something which differs in an important way from that which he contracted to buy. If this $14,000 is put into the company or if Zien pays $14,000 less, he is fully compensated. If Zien had wanted rescission for any deficiency in this account he could have stipulated for it and it would have been enforced.

For these reasons I would follow the dissenting judgment of Davey J.A. and allow the appeal.

There is a balance of $50,000 owing to Field, less the sum of $14,134.07. This is the subject of a counter-claim. In view of the fact that the counter-claim contains other items and the appellant asks that the counter-claim as a whole be referred back to the trial judge, I would limit the judgment of this Court to the following points:

(a) The appeal is allowed and the contract declared valid and binding.

(b) Judgment for the balance of the purchase price, namely, $50,000, less the damages of $14,134.07. If this sum is not accepted, it must be dealt with on the reference back to the judge.

(c) A reference back to the trial judge to decide the other items of the counter-claim.

(d) The appellants should have their costs throughout.

Appeal allowed with costs throughout.

Solicitors for the defendants, appellants: Gowan & Butts, Vancouver.

Solicitors for the plaintiffs, respondents: Grossman & Miller, Vancouver.

RALPH FOSTER AND ROGER ROBILLARD (*Plaintiffs*) ..... APPELLANTS;

1963

*June 17, 18
Dec. 16

AND

C. A. JOHANNSEN & SONS LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Construction contract—Inspection of work clause—Right of owners to access and proper facilities for access and inspection—Owners injured by fall while inspecting unfinished roof—Whether contractor liable.

The defendant construction firm was engaged in erecting a shopping centre for a company of which the plaintiffs were respectively the president and general manager. Article 13 of the construction contract provided that the plaintiffs should have access to the work wherever it was in preparation or progress and obligated the contractor to provide proper facilities for such access and for inspection. The plaintiffs visited the premises on a holiday and as no workmen were present arrangements were made with the superintendent that they would return the following week. When the plaintiffs returned on the next working day the superintendent was not on hand, but with the assistance of some workmen they climbed to the roof. There they walked about taking photographs and eventually came to an area where metal sheets were laid out preparatory to being put in their permanent place to be welded. They stepped on the butt ends of metal sheeting not supported by a girder and fell to the ground, suffering serious injuries. The trial judge held that the defendant was liable in tort for its negligence and in contract for implied breach of its obligation. He also found the plaintiffs negligent and apportioned the fault 75 per cent against the defendant and 25 per cent against the plaintiffs. The Court of Appeal allowed an appeal and held that the defendant did not fail in any duty it owed to the plaintiffs. The plaintiffs appealed to this Court.

Held: The appeal should be dismissed.

There was no basis for the application of the doctrine of *volenti non fit injuria* in this case. *Lehnert v. Stein*, [1963] S.C.R. 38, referred to.

In exercising their rights under Article 13 of the construction contract, the appellants had to act reasonably and with reasonable care on their own part for their own safety. The situation in this case could not be described as one arising from an unusual danger in relation to the appellants. They did not seek out the superintendent but went alone to the partially finished roof. They were in no danger until they ventured upon the unfinished area and that area did not have the appearance of safety and, as found by the trial judge, they should have realized and appreciated this condition.

*PRESENT: Cartwright, Fauteux, Abbott, Judson and Hall JJ.

1963

FOSTER AND ROBILLARD v. C. A. JOHANNSEN & SONS LTD.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Landreville J. Appeal dismissed.

J. J. Robinette, Q.C., and *R. W. McKimm*, for the plaintiffs, appellants.

B. J. Thomson, Q.C., and *R. K. Laishley, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which reversed a judgment of Landreville J. in which he awarded the appellant Foster damages in the sum of $18,273 and the appellant Robillard the sum of $11,859.19 against the respondent, a construction firm which was erecting a shopping centre for McArthur Plaza Shopping Centre Limited in Eastview, Ontario. Foster was President of McArthur Plaza Shopping Centre Limited and Robillard was General Manager. The two men had worked closely together for some three years chiefly with the development of the shopping centre.

Construction had progressed to the point that the Structural Steel Company, a sub-contractor, was in the course of laying the roof.

The roof was of sheet metal construction, the sheets having a length of fourteen to sixteen feet. The process of laying this roof was in three stages. First the sheets were hauled to the roof, then these sheets were placed crosswise on the steel girders which were six feet apart and lastly the sheets were adjusted in their permanent position, *viz.*: tongue and lap together on the sides and an overlap at the ends in which position they were spot-welded by an electric welding machine.

In the construction contract the following provision appeared:

> Article 13. Inspection of work.—The Owner or the Architect on his behalf and their representative shall at all times have access to the work wherever it is in preparation or progress and the Contractor shall provide proper facilities for such access and for inspection.

[1] [1962] O.R. 343, 32 D.L.R. (2d) 261.

Verification and approval of the work of construction was carried out from time to time by the architect. In addition the plaintiff, Robillard, came to the premises almost daily and the plaintiff, Foster, was said to have visited from time to time. Accommodation in a shack at the site was provided for the architect and the owner's representatives.

The facts as found by the learned trial judge are as follows:

1. On Good Friday, March 27th, 1959, Foster, Robillard, and John Doherty, Secretary-treasurer of the company, attended at the job. This being a holiday, no workmen were there. However, Alcide Thelland, the construction superintendent for the defendant company was present.
2. That it was arranged between Foster and Thelland that Foster and Robillard would return the following week. He did not accept Thelland's evidence that on their return Foster and Robillard were not to go on the roof unless escorted by Thelland or an assigned employee.
3. Foster and Robillard returned the following Monday, March 30th. Thelland was not on hand. Foster busied himself with certain matters and Robillard climbed to the roof. He walked about for approximately 15 minutes without anyone speaking to him. He took a number of photographs.
4. Robillard returned to ground level where he met Foster. Both then went to a mezzanine floor by way of a ladder being helped by some workmen who assisted them from the mezzanine floor to the roof.
5. They walked about the roof taking photographs and eventually came to the area where the sheets were laid out preparatory to being put in their permanent place to be welded.
6. That Foster and Robillard fell to the ground because they walked on the butt ends of the metal sheeting not supported by a girder and in teeter-totter manner they fell to the ground and both were seriously injured.
7. That the sheets which fell with Foster and Robillard were not in their final place and it was not negligence on the part of the appellants to have so placed the sheets in the then transitory stage of construction.
8. That the area where Foster and Robillard fell as distinct from other areas of the roof did not have the appearance of safety and Foster and Robillard should have realized and appreciated this condition. The learned judge says of this area "this area was abnormally dangerous".
9. That the area in question was not a trap or a concealed danger, but the sheets were in a position which did not present a situation of obvious danger to Foster and Robillard although the workmen would know it was dangerous to walk on those sheets.

On these facts, the learned trial judge held, having regard to Article 13 quoted above, that the respondent was liable

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Hall J.

in tort for its negligence and in contract for implied breach of its obligation. He also found Foster and Robillard negligent and apportioned the fault 75 per cent against the respondent and 25 per cent against the appellants.

The learned trial judge also held that the doctrine of *volenti non fit injuria* did not apply in this case and with this I agree. The circumstances under which the doctrine applies were fully explored in *Lehnert v. Stein*[1]. No basis for the application of the doctrine exists here on the facts so found.

McGillivray J.A., with whom Porter C.J.O. and Roach J.A. concurred, held that on the facts as found by the learned trial judge the respondent did not fail in any duty it owed to the appellants. With respect, I agree with this conclusion. While the appellants had the right under Article 13 of the construction contract to have access to the work wherever it was in preparation or progress and the contractor was under obligation to provide proper facilities for such access and for inspection, the fact remains that in exercising their rights under this article, the appellants had to act reasonably and with reasonable care on their own part for their own safety. The situation in the instant case cannot be described as one arising from an unusual danger in relation to these appellants. They did not seek out the foreman Thelland but went alone to the roof. Once on the roof, the situation was plain for them to see. Certain areas were totally uncovered, other areas were in an unfinished state, while in a certain portion the sheets had been welded into place. They were in no danger until they ventured upon the unfinished area and that area did not have the appearance of safety and, as found by the learned trial judge, they should have realized and appreciated this condition.

The appeal must, accordingly, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Mirsky, Soloway, Houston, Galligan & McKimm, Ottawa.

Solicitors for the defendant, respondent: Hughes, Laishley & Mullen, Ottawa.

[1] [1963] S.C.R. 38, 36 D.L.R. (2d) 159.

DAME EVA MARANDA (*Defendant*) ....APPELLANT;

1963

*May 29
Oct. 1

AND

MAURICE CORBEIL AND OTHERS (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Real property—Possessory action—Encroachment—Extension to building —Necessary possession established—Findings of fact—Civil Code, art. 2193—Code of Civil Procedure, art. 1064.

The parties owned adjoining properties in the city of Outremont, P.Q. The defendant acquired her property in April 1950, and commenced in June the construction of an extension to the building already erected thereon. Alleging encroachment upon their land, the plaintiffs instituted a possessory action. The action was maintained in the Superior Court and in the Court of Queen's Bench. The defendant appealed to this Court.

Held: The appeal should be dismissed.

There was ample evidence to support the findings of fact made by the two lower Courts that the plaintiffs had enjoyed the possession required by art. 2193 of the *Civil Code* and that they had been disturbed in their possession by the construction in question.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Jean J. Appeal dismissed.

J. G. Ahern, Q.C., for the defendant, appellant.

G. Laurendeau, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—The parties own adjoining emplacements lying between Côte Ste-Catherine Road and Maplewood Avenue in the city of Outremont. Respondents had acquired their property in 1945. Appellant acquired her property in April 1950 and in June of that year commenced the construction of an extension to the building already erected thereon and which the respondents claimed encroaches upon their land.

In October 1950 the respondents instituted the present possessory action alleging the encroachment and asking

*PRESENT: Taschereau C.J. and Cartwright, Abbott, Martland and Hall JJ.

[1] [1961] Que. Q.B. 533.

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Abbott J.

(1) for a declaration that they had been illegally disturbed in the possession of their property and (2) for an order requiring the appellant to demolish the said extension.

In taking this action the respondents assumed the burden of proving (a) that for a period of a year and a day their possession of the property had been continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor, art. 2193 of the *Civil Code*, and (b) that by the construction of the said extension they had been disturbed in such possession, art. 1064 of the *Code of Civil Procedure*.

The learned trial judge found that the respondents had enjoyed the possession of the property required by law, on their side of a straight line between two brick pillars, one on Côte Ste-Catherine Road and the other on Maplewood Avenue and that the extension to appellant's building encroached upon the land thus possessed by them. Those findings of fact were unanimously confirmed by the Court of Queen's Bench and there is ample evidence to support them.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Hyde & Ahern, Montreal.

Attorneys for the plaintiffs, respondents: Laurendeau & Laurendeau, Montreal.

STANLEY H. LIEBERMAN .....APPELLANT;

1963

*Feb. 26
Oct. 18

AND

HER MAJESTY THE QUEEN, ON THE INFORMATION OF FOSTER THURSTON, CHAMBERLAIN OF THE CITY OF SAINT JOHN ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Constitutional law—Sunday closing—Licensing by-law—Validity of by-law—Whether encroachment on field of criminal law—Whether in conflict with Lord's Day Act, R.S.C. 1952, c. 171—Whether in conflict with Criminal Code, 1953-54 (Can.), c. 51, ss. 160, 176—B.N.A. Act, 1867, c. 3.

The accused was charged under a by-law passed by the City of Saint John in 1908 with operating a bowling alley on Sunday. Section 3 of this licensing by-law prohibited the operation of a bowling alley between 12 midnight and 6 a.m. on weekdays, "or on Sunday". Section 4 prohibited disorderly conduct and gambling on any licensed premises. Penalties were provided for contraventions in the final section.

The accused contended that s. 3 of the by-law was invalid as being an encroachment on the field of criminal law. The charge was dismissed by a Police Magistrate on the ground that there was a conflict between s. 3 and the *Lord's Day Act*, R.S.C. 1952, c. 171. On appeal to the County Court, the accused was convicted. This judgment was affirmed by the Supreme Court of New Brunswick, Appeal Division. The accused appealed to this Court.

Held: The appeal should be dismissed.

The accused did not question the power of the City of Saint John to make by-laws for the licensing of bowling alleys within its boundaries. The matter of closing hours was also within its jurisdiction. Legislation intended to prevent the profanation of the Sabbath is part of the criminal law reserved to the Parliament by s. 91(27) of the *B.N.A. Act*. However, the impugned by-law was not primarily concerned with preserving the sanctity of the Sabbath, but was directed to the merely local matter of regulating the hours when certain licensed businesses were to close in the city of Saint John. The mere addition of the words "or on Sunday" at the end of s. 3 did not afford sufficient evidence to justify the inference that the by-law was directed towards the prevention of the profanation of the Sabbath and that it was thus beyond the ambit of provincial authority. Nor could it be said that s. 3 was inoperative as being in conflict with the *Lord's Day Act*. If the licensing power vested in the provinces by s. 92(9) of the *B.N.A. Act* was exercised in respect of a local

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

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matter and in a manner not repugnant to federal or provincial law, the provincial authority was entitled to attach such conditions and impose such penalties as it might see fit. The fact that these conditions were in conformity with federal legislation in no way invalidated the by-law. For the same reasons, it could not be said that s. 4 of the by-law was in conflict with ss. 160 and 176 of the *Criminal Code*.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], affirming the conviction of the accused on a charge of operating a bowling alley on Sunday. Appeal dismissed.

John P. Palmer, for the appellant.

G. T. Clark, Q.C., and *E. J. Lahey,* for the respondent.

W. C. Bowman, Q.C., and *F. W. Callaghan,* for the Attorney-General of Ontario.

J. W. Anderson, Q.C., for the Attorney General of Alberta.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Appeal Division of the Supreme Court of New Brunswick[1] which affirmed the conviction of the appellant for keeping a bowling alley open on Sunday contrary to the provisions of a by-law duly passed by "the City of Saint John in common council convened" on the 13th of July 1908 under the authority of the Charter of that city and entitled "A law to regulate and license public billiard rooms and pool rooms and bowling alleys in the City of Saint John".

The first section of the by-law in question provides that "no person shall carry on business as a keeper of a public billiard or pool room or bowling alley without first having obtained a licence therefor", and the second section empowers the mayor of the city to grant such licences at specified fees.

The third and fourth sections read as follows:

3. No person shall keep open any public billiard or pool room or bowling alley on any week day between the hour of twelve o'clock at night and the hour of six o'clock in the forenoon, or on Sunday.

[1] (1962), 132 C.C.C. 27, 36 D.L.R. (2d) 266.

4. No person licensed under the provisions of this law to keep any such public billiard or pool room or bowling alley shall permit any drunken or disorderly person, or any keeper of a house of ill fame, to resort to or frequent the premises kept by him, in respect to which such license has been granted, or keep, suffer or permit to be kept in such premises any faro bank, rouge et noir, roulette table or any other device for gambling of any kind to be carried on therein, or suffer or permit any noise, disorderly conduct, disturbance or breach of the peace to take place therein.

The final section of the by-law provides, *inter alia,* that "any person . . . who fails to comply with any of the provisions of this law shall forfeit and pay for each and every time such person shall so act in contravention of this law a penalty of twenty dollars to be sued for, prosecuted and recovered in the name of the Chamberlain of the said city for the time being before the police magistrate or sitting magistrate at the police office as provided by law . . .".

It is admitted that the appellant and one Mortimer L. Bernstein who were licensed keepers of a bowling alley on Union Street in the city of Saint John, kept the said bowling alley open on Sunday, the 23rd day of October 1960, as alleged in the Information but it has been contended throughout on behalf of the appellant that s. 3 of the by-law in question was invalid as constituting an encroachment on the field of criminal law.

This charge was dismissed by the police magistrate before whom the Information was laid on the ground that there was a conflict between s. 3 of the by-law and the *Lord's Day Act,* R.S.C. 1952, c. 171. In the course of his reasons for judgment, the learned magistrate said:

In other words, the by-law—if it were allowed to remain operative—would conflict with the federal statute, the Lord's Day Act, in the penalty to be imposed; and the penalty is always considered as part of the statute. On that basis, I would rule that section 3 of the by-law before this Court . . . is invalid or inoperative with regard to the matter of Sunday.

Keirstead C.C.J. before whom an appeal was taken pursuant to the provisions of the *Summary Conviction Act,* R.S.N.B. 1952, c. 220, convicted the appellant, he being of opinion

that the relevant provisions of the Lord's Day Act and the by-law differ in legislative purposes, legal effect and practical effect. The by-law imposes a duty, provides a regulation and control for purposes or objects whose nature and character bona fide fall within the field of provincial competence or authority.

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LIEBERMAN v. THE QUEEN

Ritchie J.

In the reasons for judgment dismissing the appellant's appeal delivered by McNair C.J. on behalf of the Appeal Division of the Supreme Court of New Brunswick, the matter was put thus:

> The restrictions in the by-law relating to Sunday operations, viewed in their context, appear intended for other purposes than to compel the observance or prevent the profanation of the Sabbath Day. Like their companion restrictions against night operations they seem in their true nature and character designed to promote purely secular purposes involving protection of the right of people in the community to rest and quiet during the prohibited periods. As such they are, we feel, within the legislative jurisdiction of the province and fit subject matter for municipal legislation.

The City of Saint John was incorporated by letters patent issued by the Governor of the Province of New Brunswick in 1785, and the Charter of that city has since been amended by over 500 acts of the New Brunswick Legislature. Under the provisions of that Charter, the common council of the city is given power to make by-laws for, *inter alia,*

> the good rule and government of the . . . inhabitants and residents of the said city and for the further public good, common profit, trade and better government of the said city . . . provided that such laws be not . . . repugnant to the laws of . . . England or of our said Province.

Since Confederation the powers so conferred are to be confined to the sphere of authority allotted to the provinces under the *British North America Act.* As was observed by Lord Watson in *Attorney General for Ontario v. Attorney General for Canada*[1]:

> Since that date, a provincial legislature cannot delegate any power which it does not possess and the extent and nature of the functions created must depend upon the legislative authority which it derives from the provisions of s. 92 other than no. 8.

It is true that s. 15 of the *Lord's Day Act, supra,* which was first enacted in 1906, provides that

> nothing herein shall be construed to repeal or in any way affect any provisions of any act or law relating in any way to the observance of the Lord's Day Act in force in any province of Canada when this Act comes into force; and where any person violates any of the provisions of this Act and such offence is also a violation of any other act or law the offender may be proceeded against either under the provisions of this Act or under the provisions of any other act or law applicable to the offence charged.

[1] [1896] A.C. 348 at 364.

In this regard, it is to be noted that although the "Charter of the City of Saint John" was enacted before Confederation, the impugned by-law was passed in 1908 and is therefore not a law which was in force at the time when the *Lord's Day Act* came into force. The power of the City of Saint John to make by-laws for the licensing of public billiard rooms, pool rooms and bowling alleys within its boundaries is not, however, questioned by the appellant.

The matter of hours at which shops of a specified class shall close in particular localities in a province is *prima facie* within the jurisdiction of such province under head 16 of s. 92 of the *British North America Act*. As was said by Duff J. in *City of Montreal v. Beauvais*[1], it

> is a matter which is substantially of local interest in the province and which in itself is not of any direct or substantial interest to the dominion as a whole.

It has, however, been accepted since the decision of the Privy Council in *Attorney General of Canada v. Hamilton Street Railway*[2], that legislation intended for the purpose of preventing the profanation of the Sabbath is a part of the criminal law in its widest sense and is thus reserved to the Parliament of Canada by s. 91(27) of the *British North America Act* and the immediate question raised by this appeal is whether it can be said that the impugned by-law has for its true object, purpose, nature and character the preservation of the sanctity of the Sabbath or whether it is directed to the merely local matter of regulating the hours when certain licensed businesses are to close in the City of Saint John.

In this regard, the submission for the appellant is succinctly stated in the first paragraph of the argument outlined in the factum filed on his behalf as follows:

> It is submitted that the by-law in question is invalid on the ground that it purports by the simple words "or on Sunday" to deal with matters of morals or religious observance which fall within the exclusive legislative jurisdiction of the Parliament of Canada.

The prohibition against keeping public billiard rooms, pool rooms and bowling alleys open during the hours specified in s. 3 is not to be read in isolation from the rest of the

[1] (1909), 42 S.C.R. 211 at 215.
[2] [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326.

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by-law and when the enactment is read as a whole it will be seen that the impugned section is but one of a number of regulations which the common council has imposed upon the operators of such businesses in the city of Saint John. The nature of the restrictions so imposed by the common council appears to me to reflect nothing more than the opinion of that body as to the manner in which such businesses are to be carried on for the better government of the city.

It is not to be lightly assumed that any part of the by-law is directed to a purpose beyond the legislative competence of the enacting authority and I do not think that the inclusion of Sunday in the hours of closing of these businesses necessarily carries with it any moral or religious significance.

Counsel for the appellant has called to our attention a number of cases in this Court deciding that provincial statutes designed to enforce the observance of days of religious obligation are *ultra vires,* but in each of these cases the legislation in question carried within itself clear evidence that it was directed to this end.

It appears to me to be convenient to indicate the legislation which was before the Court in each of these cases:

(i) *Re Sunday Observance*[1], in this case the Court was unable to distinguish the draft bill before them from the statute entitled "An Act to prevent the profanation of the Lord's Day" which was the subject matter of the decision in *Attorney General for Ontario v. Hamilton Street Railway, supra.*

(ii) In *Ouimet v. Bazin*[2], the very title of the Act "A Law concerning the observance of Sunday" bespoke its purpose.

(iii) *In St. Prosper v. Rodrique*[3], the legislation in question was a municipal by-law which forbade the opening of restaurants and the sale of merchandise therein on Sundays, and which contained the following preamble:

Vu qu'il importe dans l'intérêt de la paix *et des bonnes moeurs* de prohiber l'ouverture des restaurants le dimanche, et le commerce des restaurants;.

[1](1905), 35 S.C.R. 581.
[2](1911), 46 S.C.R. 502, 20 C.C.C. 458, 3 D.L.R. 593.
[3](1917), 56 S.C.R. 157, 46 D.L.R. 30.

(iv) *In Henry Birks & Sons v. City of Montreal and A.G. Quebec*[1], the impugned legislation was directed towards the closing of businesses on certain feasts of obligation of the Roman Catholic Church other than Sunday, and Kellock J. observed at page 822:

> If Sunday observance legislation was designed to enforce under penalty the observance of a day by reason of its religious significance, there is no basis for distinction, in my opinion, historically or otherwise, with respect to legislation directed to the enforcement of the observance of other days from the standpoint of their significance in any religious faith.

It seems to me that these decisions, dealing as they do with statutes the very language of which invites the conclusion that they were intended for the purpose of enforcing the observance of the religious significance attaching to the Sabbath and to other religious feasts, can have no application to the by-law now under consideration, the attack upon which is limited to the fact that the words "or on Sunday" have been added to a list of other times when certain businesses are to be closed.

The language employed by Fitzpatrick C.J. in *Ouimet v. Bazin, supra,* at page 507, appears to me to be significant. He there said of the statute before him:

> It is impossible for me to believe that the legislature intended, by the enactment in question, to regulate civil rights. On the contrary, the evident object was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. I am confirmed in this belief by the title of the Act which is described as "A Law concerning the observance of Sunday"; and, as Sedgewick J., speaking for the majority of this court, said in *O'Connor v. Nova Scotia Telephone Co.*, 22 S.C.R. 276 at page 293: "We cannot with propriety shut our eyes to the words of the title".

As I have indicated, I have reached the conclusion that the by-law here in question, entitled as it is "A Law to regulate and license public billiard and pool rooms and bowling alleys in the city of Saint John" and primarily concerned as it undoubtedly is with secular matters, has for its true object, purpose, nature or character, the regulation of the hours at which businesses of special classes shall close in a particular locality in the Province of New Brunswick which is a matter of a merely private nature in that province. As I have also indicated, I am of opinion that the mere

[1] [1955] S.C.R. 799, 113 C.C.C. 135, 5 D.L.R. 321.

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Ritchie J.

addition of the words "or on Sunday" at the end of s. 3 does not afford sufficient evidence to justify the inference that this by-law is directed towards the prevention of the profanation of the Sabbath and that it is thus beyond the ambit of provincial authority.

Nor do I think that it can be said that s. 3 of the by-law is inoperative as being in conflict with the *Lord's Day Act*. The licensing power vested in the provinces by s. 92(9) is not limited to the shop, saloon, tavern and auctioneer licenses specified in that section, and if that power is exercised in respect of a merely local matter and in a manner which is not repugnant to federal or provincial law the provincial authority is, in my opinion, entitled to attach such conditions and impose such penalties as it may see fit in respect to the manner in which the persons so licensed shall conduct the businesses which are the subject of such licenses. The fact that one or more of the conditions so imposed is in conformity with legislation validly passed by the federal government in no way invalidates the by-law.

What was said by Judson J. in *O'Grady v. Sparling*[1], concerning the alleged conflict between s. 55(1) of the *Highway Traffic Act* of Manitoba and s. 221 of the *Criminal Code* appears to me to have direct application to the conflict here alleged between the by-law and the Lord's Day Act. He there said at page 811:

> There is no conflict between these provisions in the sense that they are repugnant. The provisions deal with different subject matters and are for different purposes.

And later in the same paragraph:

> Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense there may be an overlapping) that does not mean that there is conflict so that the Court must conclude that the provincial enactment is suspended or inoperative.

It was argued before the appeal division that the entire by-law was *ultra vires* because the provisions of s. 4 were in conflict with ss. 160 and 176 of the *Criminal Code*. As to this argument, the learned Chief Justice expressed himself as follows:

> Sections 3 and 4 of the by-law seem to us separate and distinct as to subject matter, being in no way integrated in object or purpose, and

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

we feel the doctrine of severability aptly applies. Assuming, therefore, without deciding, that section 4 is constitutionally invalid its illegality does not affect the validity of section 3.

With the greatest respect, I do not share the doubts expressed by McNair C.J., as I take the view that s. 4 and the penalty which accompanies its breach constitute nothing more than another condition imposed by the city in the exercise of its right to control the manner in which these businesses shall be operated within its boundaries, and the above quoted reasoning of Judson J. in *O'Grady v. Sparling, supra,* applies with equal force to this section.

In all other respects, I am in agreement with the reasons for judgment of the Appeal Division of the Supreme Court of New Brunswick and I would dismiss this appeal but without costs.

By order of this Court, the Attorney General of Canada and the attorneys general of the provinces were served with notice of this appeal together with a copy of the factum of the appellant and the respondent and it was directed that any attorney general who desired to be heard should file a factum in this Court and serve a copy on each of the parties. The Attorney General for the Province of Alberta was, however, the only intervenant.

Appeal dismissed without costs.

Solicitors for the appellant: Teed, Palmer, O'Connell & Leger, Saint John.

Solicitor for the respondent: E. J. Lahey, Saint John.

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WALTER ROBERTSON AND FRED ROSETANNI ..... APPELLANTS;

1963
*Feb. 27, 28
Oct. 18

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Constitutional law—Sunday closing—Bowling alley—Whether infringement of religious freedom—Whether conflict with Canadian Bill of Rights, 1960 (Can.), c. 44—Lord's Day Act, R.S.C. 1952, c. 171.

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

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The appellants were convicted on a charge that they unlawfully carried on their ordinary calling, to wit, the operation of a bowling alley on a Sunday, contrary to the *Lord's Day Act*, R.S.C. 1952, c. 171. Their appeals were dismissed and they were granted leave to appeal to this Court. Their main attack was that the *Canadian Bill of Rights*, 1960 (Can.), c. 44, had in effect repealed s. 4 of the *Lord's Day Act*, or, in any event, rendered it ineffective.

Held (Cartwright J. dissenting): The appeal should be dismissed.

Per Taschereau, Fauteux, Abbott and Ritchie JJ.: The *Canadian Bill of Rights* was not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. Legislation for the preservation of the sanctity of Sunday has existed in Canada from the earliest times and has, at least since 1903, been regarded as part of the criminal law in its widest sense. Historically such legislation has never been considered as an interference with the kind of "freedom of religion" guaranteed by the *Canadian Bill of Rights*. The effect rather than the purpose of the *Lord's Day Act* should be looked to in order to determine whether its application involved the abrogation, abridgment or infringement of religious freedom. There was nothing in that statute which in any way affected the liberty of religious thought and practice. The practical result of this law on those whose religion required them to observe a day of rest other than Sunday was purely secular and financial. In some cases this was no doubt a business inconvenience, but it was neither an abrogation nor an infringement of religious freedom. The fact that it had been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday could not be construed as attaching some religious significance to an effect which was purely secular insofar as non-Christians were concerned.

Per Cartwright J., *dissenting:* The purpose and effect of the *Lord's Day Act* are to compel the observance of Sunday as a religious holy day by all the inhabitants of Canada; this is an infringement of religious freedom. Construed by the ordinary rules of construction s. 4 of the *Lord's Day Act* is clear and unambiguous and infringes the freedom of religion contemplated by the *Canadian Bill of Rights*. Parliament could not be taken to have been of the view that the *Lord's Day Act* did not infringe freedom of religion merely because that Act had been in force for more than half a century when the *Canadian Bill of Rights* was enacted. To so hold would be to disregard the plain words of s. 5(2) of the *Canadian Bill of Rights*. Where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail. Section 4 of the Lord's Day Act infringes the freedom of religion declared and preserved in the *Canadian Bill of Rights* and must, therefore, be treated as inoperative.

APPEAL from a judgment of the Court of Appeal for Ontario affirming the conviction of the appellants on a charge of operating a bowling alley on Sunday. Appeal dismissed, Cartwright J. dissenting.

J. J. Robinette, Q.C., and *S. Paikin, Q.C.*, for the appellants.

W. C. Bowman, Q.C., and *F. W. Callaghan*, for the respondent.

T. D. MacDonald, Q.C., and *D. H. Christie*, for the Attorney General of Canada.

I. G. Scott, for the Lord's Day Alliance.

The judgment of Taschereau, Fauteux, Abbott and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario rendered without formal reasons, which dismissed an appeal from a judgment of Schatz J. dismissing an appeal by the appellants, by way of stated case for the opinion of the Court, against their conviction by a provincial magistrate in and for the County of Hamilton of a charge that they did unlawfully carry on their ordinary calling, to wit, the operation of a bowling alley, contrary to *The Lord's Day Act*, R.S.C. 1952, c. 171.

By the stated case the learned Magistrate raised the following questions:

Was I right:—

(a) In holding that the appellants were in contravention of The Lord's Day Act, R.S.C., 1952, Ch. 171, and not solely in breach of By-Law No. 9252 of the Corporation of the City of Hamilton;

(b) In assuming that in proper construction and application the Lord's Day Act, R.S.C. 1952, Ch. 171, is not in conflict with the Canadian Bill of Rights, S.C. 1960, C. 44 and more particularly with Section 2 thereof.

Mr. Justice Schatz having answered both these questions in the affirmative without giving any formal reasons, the sole ground of appeal argued before the Court of Appeal for Ontario was that:

> . . . in proper construction and application the Lord's Day Act, R.S.C., 1952 Ch. 171 is in conflict with the Canadian Bill of Rights, S.C. 1960, C. 44 and more particularly with Section 2 thereof. . . .

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This Court however granted the appellants leave to appeal "at large" and on their behalf argument was directed to the following issues:

(a) That by the legislative imposition of Sunday observance as a religious value upon the whole Canadian Community, including those whose religious values and precepts permit them to engage in activities thus prohibited, the Lord's Day Act is in conflict with that human right and fundamental freedom set out in the Bill of Rights as "freedom of religion".

(b) That the effect of Section 2 of the Bill of Rights is, subject to the single qualification set out in that section, to repeal any federal enactments which are in direct conflict with the enumerated ". . . human rights and fundamental freedoms . . ." declared and enshrined in the Act.

(c) That statute law necessary for the regulation of the mode and method in which premises on which bowling is carried on are to be enjoyed, including the conditions as to time and otherwise during which the game and recreation might properly be carried on, is properly the subject of Provincial legislation.

By Section 1 of the *Canadian Bill of Rights* it is "recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex the following human rights and fundamental freedoms, namely,

(a) The right of the individual to life, liberty, security of the person and enjoyment of property; and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press."

It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. (See also s. 5(1)). It is therefore the "religious freedom" then existing in this country that is safe-guarded by the provisions of s. 2 which read, in part, as follows:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or in-

fringement of any of the rights or freedoms herein recognized and declared, . . .

It is accordingly of first importance to understand the concept of religious freedom which was recognized in this country before the enactment of the *Canadian Bill of Rights* and after the enactment of the *Lord's Day Act* in its present form, and in this regard the following observations of Taschereau J., as he then was, speaking for himself and Kerwin C.J. and Estey J., in *Chaput v. Romain*[1], appear to me to be significant:

> All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else.

The position of "religious freedom" in the Canadian legal system was summarized by Rand J. in *Saumur v. The City of Quebec*[2], where he said:

> From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of 'religious belief' and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

It is apparent from these judgments that "complete liberty of religious thought" and "the untrammelled affirmation of 'religious belief' and its propagation, personal or institutional" were recognized by this Court as existing in Canada before the *Canadian Bill of Rights* and notwithstanding the provisions of the *Lord's Day Act.*

It is to be remembered that the human rights and fundamental freedoms recognized by the Courts of Canada before the enactment of the *Canadian Bill of Rights* and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual. In referring to the "right of public discussion" in *Re Alberta Statutes*[3],

[1] [1955] S.C.R. 834 at 840, 1 D.L.R. (2d) 241 at 246, 114 C.C.C. 170.
[2] [1953] 2 S.C.R. 299 at 327, 106 C.C.C. 289.
[3] [1938] S.C.R. 100 at 133, 2 D.L.R. 81.

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Sir Lyman Duff acknowledged this aspect of the matter when he said:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in James vs. Commonwealth, (1936) A.C. 578, at 627, 'freedom governed by law'.

Although there are many differences between the constitution of this country and that of the United States of America, I would adopt the following sentences from the dissenting judgment of Frankfurter J. in *Board of Education v. Barnette*[1], as directly applicable to the "freedom of religion" existing in this country both before and after the enactment of the *Canadian Bill of Rights*:

> The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.

It is against this background that the effect of the provisions of the *Lord's Day Act* on "religious freedom" as guaranteed by the *Canadian Bill of Rights* is to be considered. Section 4 of the *Lord's Day Act* reads as follows:

> It shall not be lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or *to carry on or transact any business of his ordinary calling,* or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

The italics are my own and indicate the offence with which the appellants were charged.

There have been statutes in this country since long before Confederation passed for the express purpose of safeguarding the sanctity of the Sabbath (Sunday), and since the decision in *Attorney General for Ontario vs. Hamilton Street Railway*[2], it has been accepted that such legislation and the penalties imposed for its breach, constitutes a part of the criminal law in its widest sense and is thus reserved to the Parliament of Canada by s. 91(27) of the *British*

[1] (1943), 319 U.S. 624 at 653.
[2] [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326.

North America Act. Different considerations, of course, apply to the power to legislate for the purely secular purpose of regulating hours of labour which, except as to the regulation of the hours of labour of Dominion servants, is primarily vested in the provincial legislatures. See the reference *re Hours of Labour*[1] and *Attorney General for Canada v. Attorney General for Ontario Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act* and *Limitation of Hours Act*[2].

The immediate question raised in this appeal, however, is whether the prohibition against any person carrying on or transacting any business of his ordinary calling on Sunday as contained in the *Lord's Day Act, supra,* is such as to "abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of . . . ." the right of the appellants to freedom of religion.

It is said on behalf of the appellants that freedom of religion means "freedom to enjoy the freedom which my own religion allows without being confined by restrictions imposed by Parliament for the purpose of enforcing the tenets of a faith to which I do not subscribe." It is further pointed out that Orthodox Jews observe Saturday as the Sabbath and as a day of rest from their labours, whereas Friday is the day so observed by the members of the Mohammedan faith, and it is said that the *Lord's Day Act* imposes an aspect of the Christian faith, namely, the observance of Sunday on some citizens who do not subscribe to that faith.

My own view is that the *effect* of the *Lord's Day Act* rather than its *purpose* must be looked to in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom, and I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the "untrammelled affirmations of religious belief and its propagation" in any way curtailed.

The practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required

[1] [1925] S.C.R. 505.
[2] [1937] A.C. 326, 1 W.W.R. 299, 1 D.L.R. 673.

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to refrain from carrying on or conducting their business on Sunday as well as on their own day of rest. In some cases this is no doubt a business inconvenience, but it is neither an abrogation nor an abridgment nor an infringement of religious freedom, and the fact that it has been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned.

As has been indicated, legislation for the preservation of the sanctity of Sunday has existed in this country from the earliest times and has at least since 1903 been regarded as a part of the criminal law in its widest sense. Historically, such legislation has never been considered as an interference with the kind of "freedom of religion" guaranteed by the *Canadian Bill of Rights.*

I do not consider that any of the judges in the courts below have so construed and applied the *Lord's Day Act* as to abrogate, abridge, or infringe or authorize the abrogation, abridgment or infringement of "freedom of religion" as guaranteed by the *Canadian Bill of Rights,* nor do I think that the *Lord's Day Act* lends itself to such a construction.

I dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—The appellants were convicted on February 21, 1962, on the charge that they did, at the city of Hamilton, unlawfully carry on their ordinary calling, to wit, the operation of a bowling alley on January 14, 1962 (which was a Sunday) contrary to the *Lord's Day Act,* R.S.C. 1952, c. 171.

It is not questioned (i) that the appellants did in fact carry on their business as charged or (ii) that their so doing was forbidden by s. 4 of the *Lord's Day Act* or (iii) that that Act is *intra vires* of the Parliament of Canada.

The conviction is attacked on the ground that the *Canadian Bill of Rights,* 1960, 8-9 Eliz. II, c. 44, has in effect repealed s. 4 of the *Lord's Day Act* or, in any event, rendered it ineffective.

The relevant words of the *Canadian Bill of Rights* are set out in the reasons of my brother Ritchie, which I have

had the advantage of reading. As applicable to the circumstances of this case the provisions of s. 2 may be put as follows:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of . . . freedom of religion.

That the *Lord's Day Act* is a law of Canada within the intendment of this section is made clear by s. 5(2) of the *Canadian Bill of Rights* which reads:

> (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

The first question to be decided is whether s. 4 of the *Lord's Day Act* does infringe freedom of religion, within the meaning of those words as used in the *Canadian Bill of Rights*. In approaching this question it must be borne in mind that it has been decided repeatedly that the constitutional power of Parliament to pass the *Lord's Day Act* is found in the fact that it is enacted in relation to religion and prescribes what are in essence religious obligations. It is for this reason that it has been held to fall within head 27 of s. 91 of the *British North America Act*, the Criminal Law. Conversely it has been decided that legislation affecting the conduct of people on Sunday but enacted solely with a view to promoting some object having no relation to the religious character of that day is within the powers of the Provincial Legislatures.

It cannot be doubted that in 1867 and for many years prior thereto laws forbidding or compelling specified conduct on Sunday were regarded as forming part of the criminal law.

In Blackstone's Commentaries, vol. IV, p. 63, the learned author says:

> Profanation of the Lord's day, or *sabbath-breaking*, is a ninth offence against God and religion, punished by the municipal laws of England.

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In *Fennell et al. v. Ridler*[1], Bayley J. delivering the judgment of the Court of King's Bench and referring to *An Act for the better observation of the Lord's Day, commonly called Sunday* (1676) 29 Charles II, c. 7, said:

> The spirit of the act is to advance the interests of religion, to turn a man's thoughts from his wordly concerns, and to direct them to the duties of piety and religion.

In *Henry Birks & Sons (Montreal) Ltd. v. Montreal and Attorney General for Quebec*[2], the Court was considering the question whether provincial legislation could authorize the enactment of a by-law requiring shops to be closed on certain religious feast-days. Kellock J., with whom Locke J. agreed, said at page 823:

> Even if it could be said that legislation of the character here in question is not properly 'criminal law' within the meaning of s. 91(27), it would, in my opinion, still be beyond the jurisdiction of a provincial legislature as being legislation with respect to freedom of religion dealt with by the statute of 1852, 14-15 Vict., c. 175, Can.

I can find no answer to the argument of counsel for the appellant, that the purpose and the effect of the *Lord's Day Act* are to compel, under the penal sanctions of the Criminal law, the observance of Sunday as a religious holy day by all the inhabitants of Canada; that this is an infringement of religious freedom I do not doubt.

I agree with my brother Ritchie that the following words which he quotes from the judgment of Frankfurter J. in *Board of Education v. Barnette, supra,* are appropriate to describe the freedom of religion referred to in the *Canadian Bill of Rights*:

> Its essence is freedom from conformity to religious dogma, not freedom from conformity to *law* because of religious dogma.

But this passage presupposes that the word "law" which I have italicized means a law which has a constitutionally valid purpose and effect other than the forbidding or commanding of conduct in a solely religious aspect.

In my opinion a law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion.

[1] (1826), 5 B. & C. 408, 108 E.R. 151.
[2] [1955] S.C.R. 799, 113 C.C.C. 135, 5 D.L.R. 321.

A law which, on solely religious grounds, forbids the pursuit on Sunday of an otherwise lawful activity differs in degree, perhaps, but not in kind from a law which commands a purely religious course of conduct on that day, such as for example, the attendance at least once at divine service in a specified church.

It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

I have reached the conclusion that construed by the ordinary rules of construction s. 4 of the *Lord's Day Act* is clear and unambiguous and does infringe the freedom of religion contemplated by the *Canadian Bill of Rights*.

I cannot accept the argument that because the *Lord's Day Act* had been in force for more than half a century when the *Canadian Bill of Rights* was enacted, Parliament must be taken to have been of the view that the provisions of the *Lord's Day Act* do not infringe freedom of religion. To so hold would be to disregard the plain words of s. 5(2) quoted above.

It remains to consider the reasons for judgment of Davey J.A. in *Regina v. Gonzales*[1]. At page 239 of the C.C.C. Reports the learned Justice of Appeal says:

> In so far as existing legislation does not offend against any of the matters specifically mentioned in clauses (*a*) to (*g*) of s. 2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in s. 1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those

[1] (1962), 37 C.R. 56, 37 W.W.R. 257, 132 C.C.C. 237, 32 D.L.R. (2d) 290.

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rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s. 2, 'be so construed and applied as not to abrogate' assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.

With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2 of the *Canadian Bill of Rights,* quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the *Canadian Bill of Rights.* As already pointed out s. 5(2), quoted above, makes it plain that the *Canadian Bill of Rights* is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail.

Whether the imposition, under penal sanctions, of a certain standard of religious conduct on the whole population is desirable is, of course, a question for Parliament to decide. But in enacting the *Canadian Bill of Rights* Parliament has thrown upon the courts the responsibility of deciding, in each case in which the question arises, whether such an imposition infringes the freedom of religion in Canada. In the case at bar I have reached the conclusion that s. 4 of the *Lord's Day Act* does infringe the freedom of religion declared and preserved in the *Canadian Bill of Rights* and must therefore be treated as inoperative.

It follows that I would allow the appeal and quash the conviction. Since I have the misfortune to differ from the other members of the Court as to the result of the appeal it is unnecessary to consider what order I would otherwise have suggested as to costs.

Appeal dismissed with costs.

Solicitors for the appellants: White, Paikin, Foreman & Dean, Hamilton.

Solicitor for the respondent: J. J. Freeman, Toronto.

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